EXHIBIT 18

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al.,	)	
Plaintiffs,	)	NO. CV05-0927-JCC
WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, et al.,	)	
Plaintiff Intervenors,	)	
LIBERTARIAN PARTY OF WASHINGTON STATE, et al.,	)	
Plaintiff Intervenors,	)	
vs.	)	
STATE OF WASHINGTON, et al.,	)	
Defendant Intervenors,	)	
WASHINGTON STATE GRANGE, et al.,	)	
Defendant Intervenors	)	

DEPOSITION UPON ORAL EXAMINATION OF DWIGHT PELZ

Wednesday, August 4, 2010
Tacoma, Washington

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State Legislature?

A I'm a little unclear of this distinction, but I'm going to give you my best answer, which is that we did change this between 2008 and 2009, and that in 2008 the local party recommended to the state party a nominee, and I believe the change in the rules was that we gave the local party the power to nominate on behalf of the state party in 2009. In both cases the local party, LD organizations, for legislative races, county parties for county partisan races had a nominating convention at which PCO's could vote, and they nominated their candidate. And, again, this is the nominee of the state party, not the nominee of the local party that is being derived through this process.

Q So following up on that, even for races such as member of the Legislature, either the House or the Senate, or for county offices, this process you're describing is a process that will end in a candidate being the nominee of the state party?

A Correct.

Q Okay.

A And the state party rules dictate the procedures of the LD or county parties when it comes to nominations.

Q Okay. And by LD, that's legislative district?

A Right.

Q The legislative district parties are involved in the

nomination of, I gather, candidates for the Legislature; is that correct?

A Correct.

Q Do they also get involved in, like, county offices?

A No.

Q That would be done at the county party level?

A Yes.

Q Do -- what you're talking about is the term of nomination referring to the state Democratic Party. Is there a process -- or can county parties or legislative district parties nominate separately and possibly nominate a different candidate?

A Nomination is a term that's --

Q Okay.

A -- preserved for the state party.

Q So you --

A Local parties have endorsement procedures.

Q Okay, that's what I was about to get into. So under your current rules, nomination is kind of a term of art, and it relates specifically to the state party purposes?

A Correct.

Q Mr. Pelz, I'm going to hand you another exhibit, which I should first have marked.

MR. PHARRIS: This one I have copies of, and I'll give you a copy.

then is that Candidate A may be the nominated candidate of the state party, but a local party may choose to endorse Candidate B?

A And, for example, many local parties allow any dues-paying Democrat to participate in endorsements, so your field of electors is different than PCO's, so that might be one reason why 15 PCO's might nominate a different candidate than 150 paid members would choose to endorse.

Q Okay, thank you. Let's assume that this nomination process has occurred and we're going into a Top Two Primary such as the one that's going on right now. How does the State party convey the information about which candidates they have nominated?

A I believe we have that list on our Web site.

Q Okay. So it's -- and it's publicly available?

A Correct.

Q Okay. Does the fact of nomination affect whether the party contributes financially to a candidate's campaign?

A There is not is not a strict relationship on that question.

Q Okay.

A It is -- we make available the voter file to candidates that file as Democrats, unless we have a reason to believe that this person really is not a Democrat. So, generally speaking, in the wide preponderance of instances we will make available the voter file to the nominee and to another

C E R T I F I C A T E

I, DIXIE J. CATTELL, a duly authorized Notary Public in and for the State of Washington, residing at Olympia, do hereby certify:

That the foregoing deposition of DWIGHT PELZ was taken before me and completed on the 4th day of August, 2010, and thereafter transcribed by me by means of computer-aided transcription; that the deposition is a full, true and complete transcript of the testimony of said witness;

That the witness, before examination, was, by me, duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the witness reserved signature;

That I am not a relative, employee, attorney or counsel of any party to this action or relative or employee of such attorney or counsel, and I am not financially interested in the said action or the outcome thereof;

That I am herewith securely sealing the deposition of DWIGHT PELZ and promptly serving the same upon MR. JAMES PHARRIS.

IN WITNESS HEREOF, I have hereunto set my hand and affixed my official seal this_____day of_____, 2010.

_____
Dixie J. Cattell, CSR#2346
Notary Public in and for the State
of Washington, residing at Olympia.

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Ex. 2

Rules for the Selection of Democratic Candidates and Nominees for Public Office

As approved by the Washington State Democratic Central Committee on September 26, 2009

I. **Applicability**. These Rules shall apply to the selection of any candidate or nominee for public office who intends to be, or is, associated with the Democratic Party, directly or indirectly, on any ballot used in a publicly financed election or candidate selection process.

II. **Exclusive Means of Selection**. Candidates and nominees of the Democratic Party for public office must be selected by one of the means specified in these Rules.

III. **Democratic Primary**. Where State law provides for a public primary that complies with these Rules (hereinafter a "Democratic Primary"), candidates and nominees shall be selected by means of that Democratic Primary; provided that in the event of a vacancy on the Democratic ticket, the State Chair may fill the vacancy as specified in State law and applicable Party rules.

IV. **Rules Governing Democratic Primaries**. A public primary must comply with the following rules in order to qualify as a Democratic Primary where candidates or nominees will be selected by means of the primary:

A. **Separate Democratic Ballot Required**. All Democratic Primaries occurring on a single date shall appear on the same ballot. The ballot provided to voters in the Democratic Primaries may not contain the names of any candidate for office who is affiliated with any other political party, or of no political party, except that the State may provide to voters a ballot that may be simultaneously used in the Democratic Primaries and in primaries for offices in which no candidate's name is associated with any political party or persuasion, and in such case the ballot may contain the names of all candidates for such offices.

B. **Opportunity to Join or Confirm Membership in the Party Must be Provided.** Voters participating in the Democratic Primary must be offered the opportunity to publicly affiliate with the Democratic Party but public affiliation with the Party shall not be a requirement of participation in the Democratic Primary unless such public affiliation is required by law. As a condition of participating in the Democratic Primary, voters must either publicly affiliate with the Democratic Party or publicly indicate that they are not affiliated with any political party.

C. **Voter Participation is Public Record.** The participation of any voter in the Democratic Primary shall be a public record to the extent necessary to verify that only voters eligible under party rules receive a Democratic ballot and, in addition, the choice by any voter whether to voluntarily affiliate with the Democratic Party at the Democratic Primary or to declare a lack of affiliation with any political party shall be a public record.

D. **A Statewide System of Voluntary Voter Registration by Party** which allows voters to publicly affiliate with the Democratic Party shall satisfy the requirements of Subparagraph B, of this paragraph.

V. **Alternative Means of Selection.** Where State law does not provide for a Democratic Primary that complies with these Rules, candidates and nominees shall be selected in accordance with the following rules, provided that in the event of a vacancy on the Democratic ticket, the State Chair may fill the vacancy as provided by State law and other applicable Party rules.

A. **Authorization Required.** No candidate for public office may campaign as a Democratic candidate except as authorized pursuant to these Rules. No candidate for public office may be designated, nor permit him or herself to be designated, as the Democratic nominee for any public office unless such candidate has been designated by the Washington State Democratic Party as a Democratic nominee pursuant to this Rule.

B. **Nomination Process**

1. **County Partisan Office Nominees.** The nominees for county partisan office shall be chosen at a county nominating convention or optionally at county council district nominating conventions, consisting of elected and appointed precinct committee officers representing precincts in that county or council district. Such nominating conventions shall be called by the Chair of the County Democratic Party not later than 45 days and held not less than 14 days prior to the date filing for office commences. The results from each nominating convention shall be reported to the Chair of the Washington State Democratic Party within 24 hours after the convention has adjourned.

2. **Legislative Nominees.** The nominees for Washington State Senate and Washington State House of Representatives shall be chosen at a legislative district nominating convention consisting of elected and appointed precinct committee officers representing precincts in that legislative district. Such nominating conventions shall be called by the Chair of the Legislative District Democratic Party not later than 45 days

and held not less than 14 days prior to the date filing for office commences. The results from each nominating convention shall be reported to the Chair of the Washington State Democratic Party within 24 hours after the convention has adjourned.

3. **Majority Vote Required.** The candidate of the Democratic Party shall be the candidate who receives a majority vote of weighted ballots. If no candidate receives a majority of the first ballot, the candidate receiving the least number of votes shall be dropped from each successive ballot until a candidate receives a majority. In the event of a tie in determining which candidate shall be dropped, the candidate shall be chosen by lot.

4. **Failure to Call or Nominate.** If any County or Legislative District Chair fails to call a nominating convention as required by subparagraphs 1 or 2, the Chair of the Washington State Democratic Party shall issue the call or fill any vacancy created by the failure of the County or Legislative District Chair to issue a call. In any case where the appropriate convention has failed to designate a nominee, the nominee will be designated by the Democratic State Central Committee acting through its Chair.

5. **Statewide and Congressional Nominees.** The nominees for all statewide partisan elected offices (Governor, Lt. Governor, Secretary of State, Treasurer, Auditor, Attorney General, Insurance Commissioner, and Public Lands Commissioner) shall be selected at the Democratic State Convention in accordance with the rules for the Convention. Nominees for United States House of Representatives shall be selected by the State Central Committee. Congressional District Caucuses of those State Central Committee Members that reside in the Congressional District under consideration shall nominate a candidate. The selection of the nominees from each Congressional District shall be subject to a vote of affirmation by the State Central Committee in accordance with the rules of the State Central Committee. If a majority present and voting at the State Central Committee does not vote to affirm a selection by a Congressional District Caucus, or a Caucus does not select a nominee, then the nominee shall be selected by the State Central Committee in accordance with the rules of the State Central Committee.

a. The procedures set forth in subparagraph 5 may be delegated in whole or in part by a vote of those entitled to vote to the Washington State Democratic Central Committee.

6. **Rules for Balloting.** Each candidate or the candidate's representative shall be entitled to address the convention or meeting for not less than two minutes, or longer if provided for under rules adopted to govern the convention. Each delegate shall vote by signed ballot for no more than one candidate for each office for which nominations are sought. The results shall be tallied and reported to the Chair. The convention may dispense with balloting and nominate by acclamation for any office in which a single candidate is seeking nomination.

7. **Weighted Voting.** The number of votes at each nominating convention other than the state convention shall be equal to the sum of the number of precinct level delegates that were allocated to the precincts that are represented at the convention during the most recent National Delegate Selection process. Each elected or appointed PCO voting at the caucus or convention shall be apportioned the number of votes equal to the number of precinct level delegates his or her precinct was allotted during the most recent National Delegate Selection process. In the case of newly formulated precincts the calculation would be based on the allocation formula used in the most recent delegate selection plan.

8. These rules are mandatory and are not amendable by any party organization other than the Washington State Democratic Central Committee or the State Convention.

9. **State Chair to Notify Election Officials.** To the extent required by law or appropriate, the State Chair shall submit to state and local election officials the names of those candidates authorized to campaign as Democratic candidates and those candidates designated as Democratic nominees.

C. **Vacancy on Ticket.** A vacancy caused by the death or disqualification of nominee of the Democratic Party may be filled at any time up to and including the day prior to the election for that position. For state partisan offices in any political subdivision voted on solely by electors of a single county, an individual shall be appointed to fill such vacancy by the relevant Democratic County Central Committee. For all other partisan offices, including federal or statewide offices, an individual shall be appointed to fill such vacancy by the Washington State Democratic Central Committee. The authority granted under this section may be delegated by the County or State Democratic Central Committee to its Executive Board or Chair.

D. As a threshold of support for election under this Rule, a registered voter must have either (1) received a vote of approval of 25% of those present and voting at a meeting of the Democratic Party organization under the charter for the jurisdiction represented by the office sought or (2) at the time of filing the declaration of candidacy required by law submitted a nominating petition signed by at least 5% of those voters who at the time of signing are voters in the jurisdiction and registered with the Democratic Party or (3) at the time of filing the declaration of candidacy required by law submitted a nominating petition signed by at least 25% of the elected and appointed Democratic Precinct Committee Officers represented precincts within the jurisdiction represented by the office sought and who held such office as of the last meeting of the Democratic party organization for the jurisdiction.

VI. Threshold demonstration of Party support required. Any registered voter in the State of Washington is eligible for selection as a candidate or nominee of the Democratic Party for any public office provided:

A. The voter must publicly attest his or her support of the Democratic Party and his or her desire to be publicly known as a Democrat; and

B. The voter must be otherwise eligible under state law for election to the office sought; and

C. The voter must not have been registered as a member of any political party other than the Democratic Party for at least one (1) year immediately preceding filing for office.

VII. Decision of Executive Board Final. The decision of the executive board with respect to any question of interpretation of these rules is final

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Passed as amended by the WSDCC Elections Committee at its September 13, 2009 meeting in Kent, WA.

Passed as amended by the WSDCC Rules Committee at its September 13, 2009 meeting in Kent, WA.

Passed as amended by the WSDCC at its September 26, 2009 meeting in Walla Walla, WA.

EXHIBIT 19

may.

I would just like to close this part of my argument, if I may, by pointing out that in our view the voters have adopted a top-two election system which vindicates both the rights of the parties and the people. The parties can select their standardbearers without any State interference, adopting their own nomination process.

And the people are not limited to candidates selected by the parties. They have more choice, which is a value that was validated in the Jones decision, albeit holding that you can't do that with nonmembers selecting the party's nominees.

The parties, though, argue that no candidate can even state an expression of party preference, cannot make an expression of party preference on the ballot without the party's consent. Taken to its logical conclusion, the parties are really claiming they have a First Amendment right to require the State to place a single candidate of their choosing on the ballot.

If you look at the joint appendix, page 13 --

CHIEF JUSTICE ROBERTS: But clearly, it's just like a trademark case. I mean, they're claiming their people are going to be confused. They are going

to think this person is affiliated with the Democratic or Republican Party when they may, in fact, not be at all.

MR. McKENNA: Mr. Chief Justice, they make that claim without the benefit of any evidence. The Ninth Circuit and the district court and the parties simply assume this will happen, and they assume, for example, that ballot looks just like the old nominating primary ballot, when, in fact, as we've shown, it clearly will not. And, of course, we don't believe trademark law applies here in this case, although I can address that if you wish.

CHIEF JUSTICE ROBERTS: I didn't suggest it would be a trademark violation. I think I said it was just like the same analysis. And I don't know why you would give greater protection to the makers of products than you give to people in the political process.

MR. McKENNA: They deserve protection, of course, Mr. Chief Justice. The question is whether or not merely allowing someone to express their party preference somehow will mislead the voters. This Court has shown more faith in the voters than that.

I'll reserve the balance of my time. Thank you, Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: Thank you, General.

EXHIBIT 20

Westlaw.

--- F.3d ----, 2010 WL 3258703 (C.A.9 (Cal.)), 10 Cal. Daily Op. Serv. 10,758
(Cite as: 2010 WL 3258703 (C.A.9 (Cal.)))

Only the Westlaw citation is currently available.

United States Court of Appeals,
Ninth Circuit.
FORTUNE DYNAMIC, INC., a California Corporation, Plaintiff-Appellant,
v.
VICTORIA'S SECRET STORES BRAND MANAGEMENT, INC., a Delaware Corporation, Defendant-Appellee.
No. 08-56291.

Argued and Submitted Nov. 2, 2009.
Filed Aug. 19, 2010.

James C. Fedalen, Huang, Fedalen & Lin, LLP, Encino, CA, for the plaintiff-appellant.

Diana M. Torres, Kirkland & Ellis LLP, Los Angeles, CA, for the defendant-appellee.

Appeal from the United States District Court for the Central District of California, Manuel L. Real, District Judge, Presiding. D .C. No. 2:07-cv-02962-R-JTL.

Before THOMAS G. NELSON, JAY S. BYBEE, and MILAN D. SMITH, JR., Circuit Judges.

OPINION

BYBEE, Circuit Judge:

***1** In February 2007, Victoria's Secret ran a one-month marketing campaign promoting its new line of BEAUTY RUSH product. As part of that promotion, Victoria's Secret stores sold or gave away a hot pink tank top with the word "Delicious" written across the chest in silver typescript. Fortune Dynamic, Inc. ("Fortune"), the owner of the incontestable trademark DELICIOUS for footwear, sued Victoria's Secret for trademark infringement. The district court granted summary judgment in favor of Victoria's Secret. Mindful that "summary judgment is generally disfavored in the trademark arena," *Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1140 (9th Cir.2002) (quotation marks omitted), we reverse and remand for trial.

I

Since 1987 Fortune has been in the business of designing and selling footwear for women, young women, and children. In 1997, Fortune began using DELICIOUS as a trademark on its footwear for young women. Two years later, in 1999, Fortune registered the DELICIOUS trademark for footwear on the principal register of the U.S. Patent and Trademark Office.

For most of the time relevant to this appeal, Fortune depicted DELICIOUS in standard block lettering with a capital "D." [FN1]

> FN1. In June 2007 (after this lawsuit was filed), Fortune applied to register DELICIOUS in a stylized font for use on clothing.

Fortune spends approximately $350,000 a year advertising its footwear. In the three-year period from 2005 to 2007, Fortune sold more than 12 million pairs of DELICIOUS shoes. DELICIOUS shoes are featured on Fortune's website and in its catalogs, and have appeared in fashion magazines directed specifically to young women, including *Cosmo girl, Elle girl, Teen People, Twist, In Touch, Seventeen, Latina, ym, Shop, CB, marie claire,* and *Life & Style.* DELICIOUS footwear is available in authorized retail outlets throughout the United States.[FN2]

> FN2. In November 2006, L'egent International, Ltd. approached Fortune to explore the possibility of L'egent's subsidiary, Chaz, using Fortune's DELICIOUS Trademark on clothing and related accessories. Chaz signed a final licensing agreement in May 2007. Chaz has yet to use the DELICIOUS mark in commerce.

Victoria's Secret is a well-known company specializing in intimate apparel. It sells a wide variety of lingerie, beauty products, and personal care products in its 900 retail stores. In February 2007, Victoria's Secret launched a line of personal care products under

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--- F.3d ----, 2010 WL 3258703 (C.A.9 (Cal.)), 10 Cal. Daily Op. Serv. 10,758
(Cite as: 2010 WL 3258703 (C.A.9 (Cal.)))

the trademark BEAUTY RUSH. At the same time, it started a promotion that included giving away a gift package of BEAUTY RUSH lip gloss and-most importantly for our case-a pink tank top to anyone who purchased $35 of beauty product.[FN3] The tank top was folded inside a clear plastic pouch with the lip gloss and a coupon for a future BEAUTY RUSH purchase. Across the chest of the tank top was written, in silver typescript, the word "Delicious" with a capital "D." On the back, in much smaller lettering, there appeared the word "yum," and the phrase "beauty rush" was written in the back collar. Victoria's Secret models were featured wearing the tank top, as were mannequins on in-store display tables. Victoria's Secret distributed 602,723 "Delicious" tank tops in connection with its BEAUTY RUSH promotion, which lasted until March 2007. Those tank tops not sold or given away during the promotion were sold at Victoria's Secret's semi-annual sale a few months later.

> FN3. Forty-four Victoria's Secret stores sold the tank top for $10 with any purchase of beauty product.

***2** Victoria's Secret executives offered two explanations for using the word "Delicious" on the tank top. First, they suggested that it accurately described the taste of the BEAUTY RUSH lip glosses and the smell of the BEAUTY RUSH body care. Second, they thought that the word served as a"playful self-descriptor," as if the woman wearing the top is saying, "I'm delicious." No one at Victoria's Secret conducted a search to determine whether DELICIOUS was a registered trademark, but Victoria's Secret had run a very similar promotion several months earlier, this one in conjunction with the launch of its VERY SEXY makeup. That promotion also included a tank top, but that tank top was "black ribbed" with "Very Sexy" written in hot pink crystals across the chest. VERY SEXY is a Victoria's Secret trademark.

In March 2007, Fortune filed a complaint alleging that Victoria's Secret's use of "Delicious" on its tank top infringed Fortune's rights in its DELICIOUS mark. After the district court denied Fortune's motion for a preliminary injunction, Victoria's Secret moved for summary judgment. In its opposition to Victoria's Secret's motion for summary judgment, Fortune submitted two pieces of expert evidence: the Marylander survey (with an accompanying declaration) and the Fueroghne declaration, both of which we discuss below.

Invoking its duty to "scrutinize carefully the reasoning and methodology underlying the expert opinions offered," the district court excluded all of Fortune's proffered expert evidence. Without any of Fortune's expert evidence before it, the district court granted Victoria's Secret's motion for summary judgment, holding that the factors used to determine whether there is a likelihood of confusion "weigh[ed] in favor of Victoria's Secret," and that Fortune's claims were "entirely barred by the fair use defense." Fortune brought this timely appeal.

II

The Lanham Act creates a comprehensive framework for regulating the use of trademarks and protecting them against infringement, dilution, and unfair competition. 15 U.S.C. § 1051 *et seq.* To prove infringement, a trademark holder must show that the defendant's use of its trademark "is likely to cause confusion, or to cause mistake, or to deceive." 15 U.S.C. § 1125(a)(1)-(a)(1)(A). Protecting against a likelihood of confusion-what we have called the "core element of trademark infringement," *Brookfield Commc'ns v. W. Coast Entm't Corp.*, 174 F.3d 1036, 1053 (9th Cir.1999) (quotation marks omitted)-comports with the underlying purposes of trademark law: "[1] ensuring that owners of trademarks can benefit from the goodwill associated with their marks and [2] that consumers can distinguish among competing producers." *Thane Int'l, Inc. v. Trek Bicycle Corp.*, 305 F.3d 894, 901 (9th Cir.2002).

Eight factors, sometimes referred to as the Sleekcraft factors, guide the inquiry into whether a defendant's use of a mark is likely to confuse consumers: (1) the similarity of the marks; (2) the strength of the plaintiff's mark; (3) the proximity or relatedness of the goods or services; (4) the defendant's intent in selecting the mark; (5) evidence of actual confusion; (6) the marketing channels used; (7) the likelihood of expansion into other markets; and (8) the degree of care likely to be exercised by purchasers of the defendant's product. *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir.1979). This eight-factor analysis is "pliant," illustrative rather than exhaustive, and best understood as simply providing helpful guideposts. *Brookfield Commc'ns*, 174 F.3d at 1054;

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see E & J Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1290 (9th Cir.1992) ("This list of factors, while perhaps exhausting, is neither exhaustive nor exclusive."). The *Sleekcraft* factors are not a scorecard, a bean-counter, or a checklist. Thane, 305 F.3d at 901. "Some factors are much more important than others, and the relative importance of each individual factor will be case-specific." Brookfield Commc'ns, 174 F.3d at 1054.

***3** The Lanham Act provides some affirmative defenses, *see* 15 U.S .C. § 1115(b), one of which allows an accused infringer to avoid liability by showing that it has used the plaintiff's trademark "fairly," *id.* § 1115(b)(4). To establish a fair use defense, the defendant must show that it used the term "fairly and in good faith only to describe [its] goods or services." *Id.* We have recognized a nominative fair use defense and a classic fair use defense. Nominative fair use applies "where a defendant has used the plaintiff's mark to describe the *plaintiff's product*," Cairns v. Franklin Mint Co., 292 F.3d 1139, 1151 (9th Cir.2002) (emphasis added), whereas classic fair use-the only defense at issue here-involves a defendant's use of a descriptive term "in its primary, descriptive sense," *id.* at 1150-51 (quotation marks omitted).

We review the district court's grant of summary judgment *de novo,* and must view the evidence in the light most favorable to Fortune. In re Caneva, 550 F.3d 755, 760 (9th Cir.2008). Summary judgment is improper if there are "any genuine issues of material fact"-facts which, "under the governing substantive law, could affect the outcome of the case." *Id.* (quotation marks and ellipses omitted). "A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 761 (quotation marks and ellipsis omitted).

III

This case is yet another example of the wisdom of the well-established principle that "[b]ecause of the intensely factual nature of trademark disputes, summary judgment is generally disfavored in the trademark arena." Entrepreneur Media, 279 F.3d at 1140 (quotation marks omitted). We are far from certain that consumers were likely to be confused as to the source of Victoria's Secret's pink tank top, but we are confident that the question is close enough that it should be answered as a matter of fact by a jury, not as a matter of law by a court. *See* Thane, 305 F.3d at 901 ("Likelihood of confusion is a factual determination.").

The same is true of Victoria's Secret's reliance on the Lanham Act's fair use defense. Although it is possible that Victoria's Secret used the term "Delicious" fairly-that is, in its "primary, descriptive sense"-we think that a jury is better positioned to make that determination. *Cf.* KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 408 F.3d 596, 609 (9th Cir.2005) ("*KP Permanent II* ") (noting that genuine issues of material fact indicate that the fact finder should determine whether the "defense of fair use has been established").

A

We begin with the *Sleekcraft* factors as a way of framing our discussion. We are going to discuss each factor, but we will devote most of our attention to the similarity of the marks, the strength of Fortune's mark, the proximity of the goods, and the evidence of actual confusion.

1

***4** Although some of the *Sleekcraft* factors will not always be helpful in assessing the likelihood of confusion, "the similarity of the marks ... has always been considered a critical question in the likelihood-of-confusion analysis." GoTo.com, Inc. v. Walt Disney Co., 202 F.3d 1199, 1205 (9th Cir.2000). Three general principles help determine whether marks are similar. First, "[s]imilarity is best adjudged by appearance, sound, and meaning." Entrepreneur, 279 F.3d at 1144. Second, the "marks must be considered in their entirety and as they appear in the marketplace." GoTo.com, 202 F.3d at 1206. Third, "similarities are weighed more heavily than differences." *Id.*

Victoria's Secret makes two arguments against finding that the marks are similar. First, Victoria's Secret argues that its use of "Delicious" "differed completely in font, color, size and purpose from" Fortune's mark. Second, Victoria's Secret says that it "is inconceivable that a customer inside a VICTORIA'S SECRET retail store" could believe that the pink tank top with "Delicious" written on it, which was surrounded by BEAUTY RUSH product, could possibly

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have originated with Fortune Dynamics.

Victoria's Secret is correct that the marks have markedly different appearances. Fortune's mark is written in black, block letters on the inside heel of the shoe and on the shoe box. Victoria's Secret's "Delicious," by contrast, is written in silver cursive lettering across the chest of a hot pink tank top. On the other hand, there are substantial similarities between the marks. First, there is the obvious: the marks sound the same and look similar because they are the same word, "delicious." Moreover, in each case the word "delicious" appears alone, and not adjacent to any other word or symbol. And there is reason to think that they share the same meaning, as they are attached to items of clothing and appear to evoke desirability and pleasure.

Victoria's Secret's second argument is also not without force. It does seem unlikely that a knowledgeable consumer would believe that Fortune, which markets its shoes in a number of different retail outlets, would be selling a tank top in a Victoria's Secret store. The record reveals, however, evidence of individuals (including pop star Brittney Spears) wearing Victoria's Secret's "Delicious" pink tank top on the street. This evidence suggests the possibility of post-purchase confusion, which, we have held, "can establish the required likelihood of confusion under the Lanham Act." *Karl Storz Endoscopy Am., Inc. v. Surgical Tech., Inc.*, 285 F.3d 848, 854 (9th Cir.2002); *see Levi Strauss & Co. v. Blue Bell, Inc.*, 632 F.2d 817, 822 (9th Cir.1980). In such instances, at least, when knowledgeable consumers see the "Delicious" tank top outside Victoria's Secret stores, it seems at least plausible that they could be confused as to who produced the tank top.

Thus, in light of the principle that "similarities [between marks] are weighed more heavily than differences" and our recognition of post-purchase confusion, a jury could reasonably conclude that the "similarity of marks" factor weighs in favor of Fortune.

2

***5** We turn next to the strength of Fortune's DELICIOUS mark. As a general matter, "[t]he more likely a mark is to be remembered and associated in the public mind with the mark's owner, the greater protection the mark is accorded by trademark laws." *GoTo.com*, 202 F.3d at 1207. A mark's strength is evaluated conceptually and commercially. *Id.*

A mark's conceptual strength depends largely on the obviousness of its connection to the good or service to which it refers. The less obvious the connection, the stronger the mark, and vice versa. Using a list originally formulated by Judge Friendly, *see Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir.1976), marks are placed in one of five categories, ranging from weakest to strongest: generic, descriptive, suggestive, arbitrary, and fanciful, *GoTo.com*, 202 F.3d at 1207. At one end of the spectrum, generic marks "refer[ ] to the genus of which the particular product is a species," such as "bread" or "door," and "are not registerable" as trademarks. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). At the other end of the spectrum are arbitrary marks-actual words with no connection to the product-such as Apple computers and Camel cigarettes, and fanciful marks-made-up words with no discernable meaning-such as Kodak film and Sony electronics that are inherently distinctive and therefore receive "maximum trademark protection." *Entrepreneur*, 279 F.3d at 1141. In the middle are descriptive marks, which "describe[ ] the qualities or characteristics of a good or service" and only receive protection if they acquire secondary meaning, *Park 'N Fly*, 469 U.S. at 194, and suggestive marks, which require a consumer to "use imagination or any type of multistage reasoning to understand the mark's significance" and automatically receive protection, *Zobmondo Entm't, LLC v. Falls Media, LLC*, 602 F.3d 1108, 1114 (9th Cir.2010) (quotation marks omitted).

Categorizing trademarks is necessarily an imperfect science. Far from being neatly distinct and discrete, trademark categories often "blur at the edges and merge together." *Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 790 (5th Cir.1983), *overruled in part by KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 116 (2004) ("*KP Permanent I* "). "The labels are more advisory than definitional, more like guidelines than pigeonholes. Not surprisingly, they are somewhat difficult to articulate and to apply." *Id.; see also Abercrombie*, 537 F.2d at 9 ("The lines of demarcation ... are not ... always bright."). The line between descriptive and suggestive marks is nearly incapable of precise description. *Lahoti v. Vericheck, Inc.*, 586 F.3d 1190,

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1197 (9th Cir.2009) ("[L]egions of trademark lawyers can stay busy arguing about how marks in the middle, not so plainly descriptive, nor so plainly [suggestive], should be categorized.").

***6** "A suitable starting place" for attempting to draw the line between a suggestive and a descriptive mark "is the dictionary." *Zatarains*, 698 F.2d at 792; *see also Surgicenters of Am., Inc. v. Med. Dental Surgeries, Co.*, 601 F.2d 1011, 1015 n.11 (9th Cir.1979) ("While not determinative, dictionary definitions are relevant and often persuasive in determining how a term is understood by the consuming public...."). With that in mind, two tests help distinguish between a descriptive and a suggestive mark. First, a mark is more likely suggestive if it passes the imagination test, which asks whether the mark "requires a mental leap from the mark to the product." *Brookfield Commc'ns*, 174 F.3d at 1058; *see also* 2 J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 11:71 (4th ed. 2004) ("MCCARTHY") ("Is some reflection or multistage reasoning process necessary to cull some direct information about the product from the term used as a mark?"). "[T]he imagination test is [the] primary criterion for evaluating" whether a mark is suggestive. *Zobmondo*, 602 F.3d at 1116 (quotation marks omitted). Second, a mark is more likely suggestive if it passes the competitor test, which asks whether "the suggestion made by the mark is so remote and subtle that it is really not likely to be needed by competitive sellers to describe their goods." *Id.* at 1117 (quotation marks omitted); MCCARTHY § 11:68.

"Delicious" carries several different meanings, including "affording great pleasure," "appealing to one of the bodily senses ... esp[ecially] involving the sense of taste or smell," "delightfully amusing," and-in a definition the dictionary itself calls "obsolete"-"characterized by ... self-indulgent or sensuous pleasure." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 597 (1993). It "commonly refers to that which is tasted, smelled, or otherwise savored with maximum pleasure and keenest appreciation." *Id.*

We think that there is a genuine issue of material fact as to whether Fortune's DELICIOUS mark is suggestive or descriptive. The distinction is important here because if the mark is suggestive, there is a stronger likelihood that a jury could reasonably conclude that the "strength of the mark" factor favors Fortune. On the one hand, some evidence points to a finding that DELICIOUS as applied to footwear is merely descriptive. To the extent "delicious" means "affording great pleasure," for example, it seems to "directly convey a real and unequivocal idea of some characteristic, function, quality or ingredient of the product or service." MCCARTHY § 11:71. By that definition, DELICIOUS on footwear is nothing more than "self-laudatory advertising," a factor that cuts against categorizing the mark as suggestive. *Id.; see Zobmondo*, 602 F.3d at 1116 ("[M]erely descriptive marks need not describe the essential nature of a product; it is enough that the mark describe some aspect of the product." (quotation marks omitted)). On the other hand, a reasonable jury, viewing the evidence in the light most favorable to Fortune, might focus more on the "taste" and "smell" definitions of "delicious." In that event, the connection between DELICIOUS and footwear becomes much more attenuated, indicating that the mark is suggestive because it "requires a mental leap from the mark to the product." *Brookfield Commc'ns*, 174 F.3d at 1058. In contrast with food, to which this definition of "delicious" has a direct connection, one arguably must use some imagination-a "multi-stage reasoning process"-to get from "delicious" to footwear. MCCARTHY § 11:71. "Delicious" is not a descriptor the average consumer would associate with shoes.

***7** For the same reasons, other shoe companies are unlikely to need to rely on the word "delicious" to describe their goods. Indeed, we are aware of no other shoe companies, and Victoria's Secret points to none, that use the word "delicious" to describe their product. *See Zobmondo*, 602 F.3d at 1117-18. In sum, because "[w]hich category a mark belongs in is a question of fact," *id.* at 1113, and because the decision as to whether a mark is descriptive or suggestive " 'is frequently made on an intuitive basis rather than as a result of a logical analysis susceptible of articulation,' " *Lahoti*, 586 F.3d at 1197-98 (quoting *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1528 (4th Cir.1984)), we think a jury should assess the conceptual strength of Fortune's mark in the first instance.

Fortune also presented evidence of the DELICIOUS mark's commercial strength, which takes into account a mark's "actual marketplace recognition." *Brookfield Commcn's*, 174 F.3d at 1058. Although we have said that a suggestive mark is a "compara-

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tively weak mark," *Sleekcraft*, 599 F.2d at 349, we have also noted that "advertising expenditures can transform a suggestive mark into a strong mark," *Brookfield Commcn's*, 174 F .3d at 1058. Here, Fortune proffered evidence indicating that it spends approximately $350,000 yearly marketing its footwear and that it sold 12,000,000 pairs of DELICIOUS shoes from 2005 to 2007. In addition, Fortune has advertised its DELICIOUS footwear in a variety of popular magazines, including *Cosmo girl, Elle girl, Teen People, Twist, In Touch, Seventeen, Latina, ym, Shop, CB, marie claire,* and *Life & Style.* Whatever its ultimate force, this evidence is sufficient to make the relative commercial strength of the DELICIOUS mark a question for the jury.

3

A genuine issue of material fact also exists, under the "proximity of goods" factor, with respect to whether Fortune's footwear and Victoria's Secret's tank top are related. "Where goods are related or complementary, the danger of consumer confusion is heightened." *E & J Gallo Winery*, 967 F.2d at 1291. In addressing this factor, our "focus is on whether the consuming public is likely somehow to associate [Fortune's DELICIOUS footwear] with [Victoria's Secret's tank top]." *Brookfield Commc'ns*, 174 F.3d at 1056; *see also Recot, Inc. v. Becton*, 214 F.3d 1322, 1329 (Fed.Cir.2000) (noting that the relevant question is whether the "goods can be related in the mind of the consuming public as to the origin of the goods").

Victoria's Secret contends that the fact that "two goods are used together ... does not, in itself, justify a finding of relatedness." *Shen Mfg. Co. v. Ritz Hotel, Ltd.*, 393 F.3d 1238, 1244 (Fed.Cir.2004). We have no objection to that general proposition, but the products at issue in *Shen* did not have the same relationship as the products at issue here. The court in *Shen* was comparing "cooking classes" and "kitchen textiles," which, the court held, the "consuming public" was unlikely to "perceive ... as originating from the same source" because "one is a service [and] the other ... a tangible good." *Id.* at 1245. Here, by contrast, both of the products at issue-female footwear and a female tank top-are "tangible goods" and are targeted to the same consumers: young women. Indeed, the products are complementary. *See, e.g., Avon Shoe Co. v. David Crystal, Inc.*, 279 F.2d 607, 612 (2d Cir.1960) (noting that shoes and apparel are goods "which serve both common functions and common purchasers"). Given the intuitively close relationship between women's shoes and apparel in the minds of the consuming public, a jury could reasonably conclude that the "proximity of the goods" factor favors Fortune.

4

***8** Not surprisingly, evidence of actual confusion can also support a finding of likelihood of confusion. Perhaps"[b]ecause of the difficulty in garnering such evidence," *Sleekcraft*, 599 F.2d at 353, we have held that "[s]urvey evidence may establish actual confusion," *Thane*, 305 F.3d at 902. Here, the district court refused to admit a survey conducted by Howard Marylander showing that consumers were actually confused by Victoria's Secret's use of the word "Delicious" on its promotional tank top.

Rule 702 states that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence ... a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." FED. R. EVID. 702. Rule 702 imposes a "basic gatekeeping obligation" on district courts to "ensure that any and all scientific testimony"-including testimony based on "technical[ ] or other specialized knowledge"-"is not only relevant, but reliable." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) (quotation marks omitted). The district court must ensure that expert testimony, whether it is based on "professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* at 152. We review a district court's decision to exclude expert evidence for abuse of discretion. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 138-39 (1997).

A district court abuses its discretion if it "base[s] its decision[ ] on an erroneous legal standard." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir.2009) (quotation marks omitted). We have long held that survey evidence should be admitted "as long as [it is] conducted according to accepted principles and [is] relevant." *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 814 (9th Cir.1997); *see Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1263 (9th Cir.2001); *Southland Sod Farms v. Stover Seed Co.*,

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108 F.3d 1134, 1143 (9th Cir.1997); *E & J Gallo Winery*, 967 F.2d at 1292; *Keith v. Volpe*, 858 F.2d 467, 480 (9th Cir.1988). Furthermore, we have made clear that "technical inadequacies" in a survey, "including the format of the questions or the manner in which it was taken, bear on the weight of the evidence, not its admissibility." *Keith*, 858 F.2d at 480; *see Wendt*, 125 F.3d at 814 ("Challenges to survey methodology go to the weight given the survey, not its admissibility.").

Howard Marylander, who holds an M.B.A. in marketing from the University of Southern California, has been retained in forty-five cases to conduct a survey to determine the likelihood of confusion as to the source of goods or services. Here, Marylander conducted an on-line survey among young women ages fifteen to twenty-four to determine the likelihood of confusion between Fortune's DELICIOUS footwear and Victoria's Secret's tank top. The survey was conducted online using an e-Rewards panel consisting of 211,000 members, ages thirteen to twenty-five. Most survey participants met two criteria: in the past six months they had purchased shoes and a tank top or in the next six months they planned to purchase shoes and a tank top. Participants were excluded if anyone in their household worked in the advertising industry.

***9** Marylander divided the respondents into a test group and a control group, each composed of 300 members. The members of the test group were exposed to pictures of Fortune's DELICIOUS shoes and Victoria's Secret's "Delicious" tank top, one at a time and in rotated order. They were then asked a series of questions about whether they thought the two marks come from the same company, related companies, or they did not know. The same protocol was followed with the control group, of which there were also 300 members, except that instead of the word "Delicious" on the tank top, one-third of the control group saw the word "Beautiful," one-third saw "Fabulous," and one-third saw "Incredible."

Of those in the test group, 46% believed that the DELICIOUS shoes and the "Delicious" tank top came from the same company. An additional 8% thought that the companies that created the shoes and the tank top were related or associated. In the control group, 18% thought the products came from the same company, and 25% thought the companies were related or associated. Marylander concluded that 54% of the test group (46  8) confused the products, as compared to only 43% (18 25) in the control group, and that the difference was statistically significant.

According to Marylander, the survey results strongly suggested that there was a likelihood of confusion among consumers between Fortune's DELICIOUS shoes and Victoria Secret's "Delicious" tank top. He based this conclusion on three principal factors: (1) the disparity between the amount of confusion in the test group and the control group (11%); (2) the unusually high disparity between those who believed the products came from the same company (28%); and (3) the fact that the disparity in confusion levels would have been higher if respondents had not seen "beauty rush" in the back collar, as was the case for those consumers who only saw the tank top on models or mannequins.

The district court excluded the Marylander survey because the survey compared the products side-by-side, failed to replicate real world conditions, failed to properly screen participants, and was "highly suggestive." The district court supported most of its reasoning by reference to unpublished district court decisions, only one of which even falls within the Ninth Circuit. The court's one citation to Ninth Circuit precedent, moreover, is not helpful. In support of its conclusion that the survey should not have compared the products "side-by-side," the district court cited our decision in *Levi Strauss & Co. v. Blue Bell, Inc.*, 632 F.2d 817 (9th Cir.1980), in which we noted that "[i]t is axiomatic in trademark law that 'side-by-side' comparison is not the test." *Id.* at 822. But that statement, far from setting forth a standard for admitting survey evidence, merely provided support for our recognition of the possibility of post-sale confusion. *See id.* at 822 ("Wrangler's use of its projecting label is likely to cause confusion among prospective purchasers who carry even an imperfect recollection of Strauss's mark and who observe Wrangler's projecting label *after the point of sale.* It is axiomatic in trademark law that 'side-by-side' comparison is not the test." (emphasis added)). Indeed, the question of the admissibility of survey evidence nowhere surfaced in *Levi Strauss.* What makes the district court's misuse of *Levi Strauss* even more glaring is its failure to mention *even one* of the numerous cases in which we have held that survey evidence should be admitted "as long as [it is] conducted according to accepted principles and [is] relevant." *Wendt*, 125 F.3d at

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814. In sum, we conclude that the district court abused its discretion in excluding the survey because Marylander appears to have conducted the survey in accordance with accepted principles, and because the results of the survey are relevant to the ultimate question whether Victoria's Secret's use of "Delicious" was likely to confuse consumers.

***10** By way of comparison, we approved of a similar survey in *Thane*. There, the expert conducting the survey selected 400 people over the age of 18 who had purchased a bike in the last three years or planned to purchase one within the next year. *See Thane*, 305 F.3d at 902. These bike enthusiasts were interviewed in shopping malls throughout the country. Three hundred of the respondents were shown pictures of Trek products and OrbiTrek products and asked questions about the companies' association. The remaining 100, the control group, were shown the same Trek pictures, but saw pictures from Yukon, a third company, instead of from OrbiTrek. *Id.* at 902 n. 6. The principles applied in the Marylander survey are virtually indistinguishable. Three hundred respondents were asked to compare pictures of DELICIOUS shoes and the "Delicious" tank top, and then to answer questions about the companies that produced them. A different group of 300 respondents were shown slightly different pictures and asked the same questions. Marylander then tabulated the results to come to a conclusion regarding the likelihood of confusion.

To be sure, as Victoria's Secret argues and as the district court noted, the Marylander survey has a number of shortcomings, including the fact that it was conducted over the internet (thereby failing to replicate real world conditions), may have been suggestive, and quite possibly produced counterintuitive results. But these criticisms, valid as they may be, go to "issues of methodology, survey design, reliability, ... [and] critique of conclusions," and therefore "go to the weight of the survey rather than its admissibility." *Clicks Billiards*, 251 F.3d at 1263; *cf. Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993) ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."). Viewing the survey in the light most favorable to Fortune, as we must, we conclude that the survey creates a genuine issue of material fact as to whether consumers were confused by Victoria's Secret's use of "Delicious."

5

The next *Sleekcraft* factor focuses our attention on the relative sophistication of the relevant consumer, and the degree of care likely to be exercised by that consumer. The reference point for this factor "is the typical buyer exercising ordinary caution." *Sleekcraft*, 599 F.2d at 353. As we explained in *Sleekcraft*, this "standard includes the ignorant and the credulous." *Id.* "We expect" the typical buyer "to be more discerning-and less easily confused-when he is purchasing expensive items." *Brookfield Commc'ns*, 174 F.3d at 1060. "On the other hand, when dealing with inexpensive products, customers are likely to exercise less care, thus making confusion more likely." *Id.*

The parties vigorously contest the relative sophistication of the young women purchasing their products. Victoria's Secret argues that "[p]urchasers of apparel are considered ... sophisticated consumers." For support, Victoria's Secret points to one court's observation that "fashion-conscious" young women "are likely to exercise a significant degree of care in purchasing their clothing, since the name of the particular designer is important in the fashion world." *Kookai, S.A. v. Shabo*, 950 F.Supp. 605, 609 (S.D.N.Y.1997). On the other hand, as Fortune points out, we have noted the absence of a "clear standard ... for analyzing moderately priced goods, such as non-designer clothing." *Surfvivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 634 (9th Cir.2005). And a wellrespected commentator on trademark law has questioned "the wisdom of ... sweeping judicial observation[s] about relative sophisticated buying habits based on gender." MCCARTHY § 23:99.

***11** We cannot determine with any degree of confidence the relative sophistication of the parties' consumers. Nor are we confident of the implications of finding that the consumers are sophisticated. We think it possible that a discerning consumer might immediately connect the like-named products more readily than an unsophisticated consumer. Whoever's right, the difficulty of trying to determine with any degree of confidence the level of sophistication of young women shopping at Victoria's Secret only confirms the need for this case to be heard by a jury.

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6

There are also genuine issues of material fact with respect to the remaining factors (marketing channels, likelihood of expansion, and Victoria's Secret's intent). We recognize that some evidence related to these factors supports Victoria's Secret. For instance, the fact that Fortune is exclusively a wholesaler that sells its shoes to a number of authorized retail outlets, while Victoria's Secret is primarily a retailer, operating approximately 900 retail stores nationwide under its own name, cuts against Fortune. As for the likelihood of expansion, Fortune has entered a licensing agreement with Chaz to use the DELICIOUS mark on clothing, but there is no indication that Chaz has begun using the license and Victoria's Secret no longer creates any clothing with the word"Delicious" on it. Finally, aside from the fact that Victoria's Secret failed to investigate the possibility that DELICIOUS was being used as a mark before promoting its tank top, there is little evidence that Victoria's Secret intended to trade on Fortune's goodwill.

Nonetheless, "[l]ikelihood of confusion is a factual determination," and "district courts should grant summary judgment motions regarding the likelihood of confusion sparingly." *Thane,* 305 F.3d at 901-02. Granting summary judgment in cases in which a majority of the *Sleekcraft* factors could tip in either direction is inconsistent with that principle. Because "a jury could reasonably conclude that most of the [*Sleekcraft*] factors weigh in [Fortune's] favor," *Wendt,* 125 F.3d at 812; *see KP Permanent II,* 408 F.3d at 608, the district court erred in granting Victoria's Secret's motion for summary judgment on the question of likelihood of confusion.

B

We next turn to Victoria's Secret's argument that its use of the word "Delicious" was protected by the Lanham Act's fair use defense. 15 U.S.C. § 1115(b)(4). Long before the Lanham Act was enacted, the Supreme Court explained that "[t]he use of a similar name by another to truthfully describe his own product does not constitute a legal or moral wrong, even if its effect be to cause the public to mistake the origin ... of the product." *William R. Warner & Co. v. Eli Lilly & Co.,* 265 U.S. 526, 529 (1924). Congress codified this common law principle in the Lanham Act's fair use defense, which allows a party to use a descriptive word "otherwise than as a mark ... [and] fairly and in good faith only to describe the goods or services of such party, or their geographic origin." 15 U.S.C. § 1115(b)(4). In establishing that its use was fair, the defendant is not required to"negate confusion ." *KP Permanent I,* 543 U.S. at 118. This is because, although the Lanham Act is less than clear on the subject, the Supreme Court recently clarified that, consistent with *Eli Lilly,* "some possibility of consumer confusion must be compatible with fair use." *Id.* at 121. Finally, Victoria's Secret's subjective good faith is relevant to the inquiry, but the overall analysis focuses on whether Victoria's Secret's use of "Delicious" was "objectively fair." *Id.* at 123.

***12** The fair use defense stems from the "undesirability of allowing anyone to obtain a complete monopoly on use of a descriptive term simply by grabbing it first." *Id.* at 122; *see Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.,* 469 U.S. 189, 200 (1985) (noting that the Lanham Act was not intended to "create an exclusive right to use language that is descriptive of a product"). To avoid monopolization, a company such as Victoria's Secret may invoke a trademark term in its descriptive sense "regardless of [the mark's] classification as descriptive, suggestive, arbitrary, or fanciful." *Brother Records, Inc. iv. Jardine,* 318 F.3d 900, 907 (9th Cir.2003). In other words, how Fortune's DELICIOUS mark is categorized as a matter of conceptual strength has no bearing on whether Victoria's Secret is entitled to the fair use defense.

According to Victoria's Secret, it should prevail on the fair use defense because, as the Lanham Act provides, it used the term "Delicious" "otherwise than as a mark," "only to describe [its] goods or services," and "in good faith." 15 U.S.C. § 1115(b)(4). We think there is some merit to Victoria's Secret's argument, but ultimately conclude that the question of "fair use," like the question of likelihood of confusion, should be resolved by a jury. We consider each of the "fair use" factors in turn.

1

We first consider whether the district court correctly ruled, as a matter of law, that Victoria's Secret used "Delicious" "otherwise than as a mark." 15 U.S.C. § 1115(b)(4). The Lanham Act defines a trademark as

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something used "to identify and distinguish ... goods ... and to indicate the source of the goods." *Id.* § 1127. To determine whether a term is being used as a mark, we look for indications that the term is being used to "associate it with a manufacturer." *Sierra OnLine, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1423 (9th Cir.1984). Indications of trademark use include whether the term is used as a "symbol to attract public attention," *JA Apparel Corp. v. Abboud*, 568 F.3d 390, 400 (2d Cir.2009), which can be demonstrated by "the lettering, type style, size and visual placement and prominence of the challenged words," MCCARTHY § 11:46. Another indication of trademark use is whether the allegedly infringing user undertook "precautionary measures such as labeling or other devices designed to minimize the risk that the term will be understood in its trademark sense." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 28 cmt. c (1995) ("RESTATEMENT"); *see also Packman v. Chicago Tribune Co.*, 267 F.3d 628, 639 (7th Cir.2001) (noting, in finding fair use, that the newspaper's "joy of six" t-shirt "plainly indicat[ed] the Tribune as the source").

Here, there is evidence from which a reasonable jury could conclude that Victoria's Secret was using "Delicious" as a trademark. "Delicious" was written in large letters, with a capital "D," and in silver typescript across the chest, suggesting that Victoria's Secret used the word to attract public attention. Further, there is little evidence that Victoria's Secret employed "precautionary measures" to avoid confusion with Fortune's mark. It is true that the word "yum" appeared on the back of the tank top and "beauty rush" appeared in its back collar. But a jury could reasonably conclude that those hard-to-find words did not detract from the overall message broadcast loudly on the front of the shirt, "Delicious." Perhaps most important, Victoria's Secret's used "Delicious" in a remarkably similar way to how it uses two of its own trademarks-PINK and VERY SEXY. PINK is written in bold capital letters on different items of Victoria's Secret clothing, while VERY SEXY was written, in hot pink crystals, across the chest of a similar black-ribbed tank top during a very similar promotion. The fact that Victoria's Secret used "Delicious" in the same way that it uses other Victoria's Secret trademarks could be persuasive evidence to a jury that Victoria's Secret used, or at least intended to establish, "Delicious" as a trademark.

***13** In support of its argument that Victoria's Secret used "Delicious" as a trademark, Fortune attempted to introduce the testimony of expert Dean K. Feuroghne, a forty-year advertising and marketing professional, who would have testified that Victoria's Secret used "Delicious" as a trademark. We think the district court acted within its discretion to exclude this portion of Fueroghne's testimony.[FN4] The basis of his knowledge regarding trademark use is not entirely clear. More important, Fueroghne's opinion does not "assist" the jury because the jury is well equipped " 'to determine intelligently and to the best possible degree' " the issue of trademark usage " 'without enlightenment from those having a specialized understanding of the subject involved in the dispute.' " FED. R. EVID. 702 advisory committee's note (quoting Mason Ladd, *Expert Testimony,* 5 VAND. L. REV. 414, 418 (1952)). Even though we agree that this portion of Fueroghne's proffered testimony was properly excluded, we believe that there still remains a genuine issue of material fact as to whether Victoria's Secret used "Delicious" as a trademark.

FN4. The other portion of Fueroghne's proffered testimony is discussed below.

2

A genuine issue of material fact also remains with respect to whether Victoria's Secret used the word "Delicious" "only to describe [its] goods or services." 15 U.S.C. § 1115(b)(4). To prevail on this factor, we have held, a defendant must establish that it used the word "in[its] primary, descriptive sense" or "primary descriptive meaning." *Brother Records*, 318 F.3d at 906. As a practical matter, "it is sometimes difficult to tell what factors must be considered to determine whether a use ... is descriptive." *EMI Catalogue P'ship v. Hill, Holliday, Connors, Cosmopulos Inc.*, 228 F.3d 56, 64 (2d Cir.2000). We agree with the Restatement, however, that the scope of the fair use defense varies with what we will call the descriptive purity of the defendant's use and whether there are other words available to do the describing. *See* RESTATEMENT § 28, cmt. c.

Victoria's Secret makes two points-one factual and one legal-in support of its argument that it used "Delicious" descriptively. As to facts, Victoria's Secret says that it used "Delicious" merely to "describe the flavorful attributes of Victoria's Secret's BEAUTY

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RUSH lip gloss and other products that feature the same popular fruit flavors." A jury, however, could reasonably conclude otherwise. For one thing, in its advertisements, Victoria's Secret described its BEAUTY RUSH lip gloss as "deliciously sexy," not delicious. For another, Victoria's Secret's executives testified that they wanted "Delicious" to serve as a "playful self-descriptor," as if the wearer of the pink tank top is saying, "I'm delicious." These examples suggest that a jury could reasonably decide that Victoria's Secret did not use "Delicious" "only to describe its goods." *See* RESTATEMENT § 28, cmt. c. ("If the original meaning of the term is not in fact descriptive of the attributes of the user's goods, services, or business, the [fair use] defense is not applicable.").

***14** As to law, Victoria's Secret argues that it used "Delicious" in a permissible "descriptive sense," even if its use of the word was not technically descriptive. Victoria's Secret points to the Second Circuit's decision in *Cosmetically Sealed Industries, Inc. v. Chesebrough-Pond's USA Co.*, 125 F.3d 28 (2d Cir.1997), in which the court noted that the statutory requirement that a defendant use the term "only to describe [its] goods or services" "has not been narrowly confined to words that describe a characteristic of the goods, such as size or quality." *Id.* at 30. Instead, that court observed, "the phrase permits use of words or images that are used ... in their 'descriptive sense.' " *Id.* Under that standard, the court held that although the defendants' use of the phrase "Seal it With a Kiss" "d [id] not describe a characteristic of the defendants' product," it was used in its " 'descriptive sense'-to describe an action that the sellers hope consumers will take, using their product." *Id.* Other Second Circuit cases have followed the same general approach. *See Car-Freshner Corp. v. S.C. Johnson & Son, Inc.*, 70 F.3d 267, 270 (2d Cir.1995) (concluding that the defendant had established fair use because its "pinetree shape" air freshener "describes ... the pine scent" and "refers to the Christmas season, during which Johnson sells th[e] item"); *B & L Sales Assocs. v. H. Daroff & Sons, Inc.*, 421 F.2d 352, 353 (2d Cir.1970) (upholding the defendant's use of the phrase "Come on Strong" because it "describe[d] the manner in which [the] clothing would assist the purchaser in projecting a commanding, confident, 'strong' image to his friends and admirers"). *But see EMI*, 228 F.3d at 65 (holding that, although the word "Swing" "undoubtedly describes both the action of using a golf club and the style of music on the soundtrack," "Swing, Swing, Swing [wa]s not necessarily [descriptive]").

We have no quarrel with the general proposition that the fair use defense may include use of a term or phrase in its "descriptive sense," which in some instances will describe more than just "a characteristic of the [defendant's] goods." MCCARTHY § 11:49; *see Brother Records*, 318 F.3d at 907. We also agree that a capacious view of what counts as descriptive supports Victoria's Secret's argument that its use of "Delicious" qualifies as fair use. Even under this view of whether a use counts as descriptive, however, we think that a jury could reasonably conclude that Victoria's Secret's use was not fair under this factor, for three reasons.

First, although we accept some flexibility in what counts as descriptive, we reiterate that the scope of the fair use defense varies with the level of descriptive purity. Thus, as a defendant's use of a term becomes less and less purely descriptive, its chances of prevailing on the fair use defense become less and less likely. *See* RESTATEMENT § 28, cmt. c. And here, a jury could reasonably conclude, for the same reasons it might conclude that DELICIOUS as applied to footwear is not descriptive, *see supra* Part III.A.2, that Victoria's Secret's use of "Delicious" on a pink tank top did not qualify as sufficiently descriptive for Victoria's Secret to prevail on the fair use defense.

***15** Second, even if a jury thought that there was some evidence of descriptive use, it could still reasonably conclude that the lack of "precautionary measures" on Victoria's Secret's pink tank top outweighs that evidence. Indeed, the same Second Circuit decisions upon which Victoria's Secret relies support this view. In *Cosmetically Sealed*, for example, "[t]he product name 'Color Splash' "-the defendant's trademark-"appeared in the center of the display in red block letters, at least twice the size of the lettering for 'Seal it with a Kiss.' " 125 F.3d at 29-30. And "the brand name 'CUTEX' [appeared] in block letters three times the size of the 'Seal it' instruction." *Id.* at 30. *B & L Sales* describes a similar layout: "Directly below this phrase ['Come on Strong'], in somewhat smaller, yet readily visible, block-type print appears the phrase 'With Botany 500.' Thus the copy reads 'COME ON STRONG with Botany 500.' " 421 F.2d at 353. Here, by contrast, the word "Deli-

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cious" appeared all by itself on the front of a tank top. Even though other words, such as "beauty rush" and "yum yum," appeared elsewhere on the top, a jury could reasonably conclude that in order to prevail on the fair use defense, Victoria's Secret should have been more careful about "indicating [Victoria's Secret] as the source." *Packman*, 267 F.3d at 639.

Finally, there is little doubt that Victoria's Secret had at its disposal a number of alternative words that could adequately capture its goal of providing a "playful self-descriptor" on the front of its tank top. An abundance of alternative words is important because it suggests that Victoria's Secret's use was more suggestive than descriptive. *See* MCCARTHY § 11:45 ("[T]o be eligible for ... fair use, [a] defendant must be using the challenged designation in a descriptive, not merely suggestive, sense."). If so, restricting Victoria's Secret's use of "Delicious" does not implicate the same concerns regarding the monopolization of the lexicon that lie at the heart of the fair use defense. *See KP Permanent I*, 543 U.S. at 122; *see also Peaceable Planet, Inc. v. Ty, Inc.*, 362 F.3d 986, 991 (7th Cir.2004) ("There are many more ways of suggesting than of describing."); *Abercrombie*, 537 F.2d at 11 ("The English language has a wealth of synonyms and related words with which to describe the qualities which manufacturers may wish to claim for their products...."). Overall, we think a genuine issue of material fact remains as to whether Victoria's Secret used "Delicious" only to describe its goods or services.

3

The last factor of the fair use defense asks whether the defendant has exercised "good faith." We have not given this factor of the fair use defense much attention, but we agree with the Second Circuit that it involves the same issue as the intent factor in the likelihood of confusion analysis: "whether defendant in adopting its mark intended to capitalize on plaintiff's good will." *EMI*, 228 F.3d at 66. Fortune argues that a jury could construe Victoria's Secret's failure to investigate the possibility that DELICIOUS was being used as a mark as evidence of bad faith. For support, Fortune offers the other portion of Fueroghne's expert testimony, in which Fueroghne opines that "[i]t is standard practice in the advertising and marketing industry ... to perform at least a cursory search on the Internet and with the United State[s] Trademark Office to see what else is out in the market ... to avoid possible conflicts or confusion." The district court excluded this evidence for the same reasons it excluded Fueroghne's other testimony, because Fueroghne "is not an expert in any field relevant to this case."

***16** With respect to this portion of Fueroghne's testimony, the district court is plainly wrong. Fueroghne has forty years of experience in the marketing and advertising industry, strongly suggesting that he is familiar with what companies within the industry do when placing words on a product. Fueroghne's expertise, then, is one based on experience. *Cf. Hangarter v. Provident Life and Accident Ins. Co.*, 373 F.3d 998, 1016 (9th Cir.2004) (concluding that an expert's "significant knowledge of and experience within the insurance industry" provided "the minimal foundation" required to give " 'expert' testimony on the practice and norms of insurance companies in the context of a bad faith claim" (emphasis and quotation marks omitted)). More important, Fueroghne's testimony "will assist the trier of fact ... to determine a fact in issue," FED. R. EVID. 702, as it supports an inference that Victoria's Secret acted in bad faith. Therefore, we conclude that the district court abused its discretion in excluding this portion of Fueroghne's testimony.

On the whole, we think that the evidence of malicious intent on the part of Victoria's Secret, even with Fueroghne's expert testimony, is thin at best. But Victoria's Secret's failure to investigate whether someone held a DELICIOUS trademark, combined with the other evidence discussed above, provides support for a jury's potential finding that Victoria's Secret's carelessness in its use of the word "Delicious" rendered its use of that word "objectively [un]fair." *KP Permanent I*, 543 U.S. at 123.

IV

Finally, Fortune asks us to remand the case to a different judge. Because this case does not present "unusual circumstances," *McSherry v. City of Long Beach*, 423 F.3d 1015, 1023 (9th Cir.2005), we reject Fortune's request. There is no indication in the record that the district court will be unable to put out of his mind previously expressed views or that reassignment is necessary to "preserve the appearance of justice." *Id.*(quotation marks omitted). Fortune princi-

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pally relies on the district court's wholesale adoption of Victoria's Secret's proposed findings of facts and law. But although we "reiterate our disfavor of the practice [of] ... adopting one party's proposed findings of fact and conclusions of law substantially verbatim," *Vuitton Et Fils S.A. v. J. Young Enters., Inc.*, 644 F.2d 769, 778 (9th Cir.1981); *see also Silver v. Executive Car Leasing Long-Term*, 466 F.3d 727, 733 (9th Cir.2006) (remarking on the "regrettable practice of adopting the findings drafted by the prevailing party wholesale"), we decline to impose the "extraordinary measure of reassignment," *McSherry*, 423 F.3d at 1023.

V

This case should go to trial. A jury could reasonably conclude that the majority of *Sleekcraft* factors favors Fortune.

Furthermore, in light of evidence suggesting that Victoria's Secret used the term "Delicious" as a trademark and suggestively rather than descriptively, together with Victoria's Secret's failure to investigate the possibility that DELICIOUS was already being used as a trademark, there remains a genuine issue of material fact as to whether Victoria's Secret used "Delicious" unfairly.

***17** REVERSED and REMANDED.

C.A.9 (Cal.),2010.
Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Management, Inc.
--- F.3d ----, 2010 WL 3258703 (C.A.9 (Cal.)), 10 Cal. Daily Op. Serv. 10,758

END OF DOCUMENT

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EXHIBIT 21

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WACs > Title 434 > Chapter 434-230 > Section 434-230-035

434-230-030 << 434-230-035 >> 434-230-045

Agency filings affecting this section

WAC 434-230-035
Office format.

(1) The name of each office must be printed on the ballot.

(2) The description "partisan office" must be printed either for each partisan office or as a heading above a group of partisan offices. The description "nonpartisan office" must be printed either for each office or as a heading above a group of nonpartisan offices.

(3) If the term of office is not a full term, a description of the term (e.g., short/full term, two-year unexpired term) must be printed with the office name.

(4) Following each list of candidates shall be a response position and a space for writing in the name of a candidate.

(5) Each office or position must be separated by a bold line.

(6) On a general election ballot in a year that president and vice-president are elected, each political party's candidates for president and vice-president shall be provided one vote response position for that party.

[Statutory Authority: RCW 29A.04.611. 08-15-052, § 434-230-035, filed 7/11/08, effective 8/11/08.]

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RCWs > Title 29A > Chapter 29A.36 > Section 29A.36.121

29A.36.115 << 29A.36.121 >> 29A.36.131

RCW 29A.36.121
Order of offices and issues — Party indication.

(1)(a) The positions or offices on a primary consolidated ballot shall be arranged in substantially the following order: United States senator; United States representative; governor; lieutenant governor; secretary of state; state treasurer; state auditor; attorney general; commissioner of public lands; superintendent of public instruction; insurance commissioner; state senator; state representative; county officers; justices of the supreme court; judges of the court of appeals; judges of the superior court; and judges of the district court. For all other jurisdictions on the primary consolidated ballot, the offices in each jurisdiction shall be grouped together and be in the order of the position numbers assigned to those offices, if any.

(b)(i) The positions or offices on a primary party ballot must be arranged in substantially the following order: United States senator; United States representative; governor; lieutenant governor; secretary of state; state treasurer; state auditor; attorney general; commissioner of public lands; insurance commissioner; state senator; state representative; and partisan county officers. For all other jurisdictions on the primary party ballot, the offices in each jurisdiction must be grouped together and be in the order of the position numbers assigned to those offices, if any.

(ii) The positions or offices on a primary nonpartisan ballot must be arranged in substantially the following order: Superintendent of public instruction; justices of the supreme court; judges of the court of appeals; judges of the superior court; and judges of the district court. For all other jurisdictions on the primary nonpartisan ballot, the offices in each jurisdiction must be grouped together and be in the order of the position numbers assigned to those offices, if any.

(2) The order of the positions or offices on an election ballot shall be substantially the same as on a primary consolidated ballot except that state ballot issues must be placed before all offices. The offices of president and vice president of the United States shall precede all other offices on a presidential election ballot. The positions on a ballot to be assigned to ballot measures regarding local units of government shall be established by the secretary of state by rule.

(3) The political party or independent candidacy of each candidate for partisan office shall be indicated next to the name of the candidate on the primary and election ballot. A candidate shall file a written notice with the filing officer within three business days after the close of the filing period designating the political party to be indicated next to the candidate's name on the ballot if either: (a) The candidate has been nominated by two or more minor political parties or independent conventions; or (b) the candidate has both filed a declaration of candidacy declaring an affiliation with a major political party and been nominated by a minor political party or independent convention. If no written notice is filed the filing officer shall give effect to the party designation shown upon the first document filed. A candidate may be deemed nominated by a minor party or independent convention only if all documentation required by chapter 29A.20 RCW has been timely filed.

[2004 c 271 § 129.]

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RCWs > Title 29A > Chapter 29A.52 > Section 29A.52.112

29A.52.111 << 29A.52.112 >> 29A.52.116

RCW 29A.52.112
Top two candidates — Party or independent preference.

(1) A primary is a first stage in the public process by which voters elect candidates to public office.

(2) Whenever candidates for a partisan office are to be elected, the general election must be preceded by a primary conducted under this chapter. Based upon votes cast at the primary, the top two candidates will be certified as qualified to appear on the general election ballot, unless only one candidate qualifies as provided in *RCW 29A.36.170.

(3) For partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, then that preference will be shown after the name of the candidate on the primary and general election ballots by appropriate abbreviation as set forth in rules of the secretary of state. A candidate may express no party or independent preference. Any party or independent preferences are shown for the information of voters only and may in no way limit the options available to voters.

[2005 c 2 § 7 (Initiative Measure No. 872, approved November 2, 2004).]

Notes:

Reviser's note: *(1) RCW 29A.36.170 was repealed by 2004 c 271 § 193 and was subsequently amended by 2005 c 2 § 6 (Initiative Measure No. 872). Later enactment, see RCW 29A.36.171.

(2) The constitutionality of Initiative Measure No. 872 was upheld in *Washington State Grange v. Washington State Republican Party, et al.*, 552 U.S. . . . (2008).

Short title -- 2005 c 2 (Initiative Measure No. 872): "This act may be known and cited as the People's Choice Initiative of 2004." [2005 c 2 § 1 (Initiative Measure No. 872, approved November 2, 2004).]

Intent – 2005 c 2 (Initiative Measure No. 872): "The Washington Constitution and laws protect each voter's right to vote for any candidate for any office. The Washington State Supreme Court has upheld the blanket primary as protecting compelling state interests "allowing each voter to keep party identification, if any, secret; allowing the broadest possible participation in the primary election; and giving each voter a free choice among all candidates in the primary." *Heavey v. Chapman*, 93 Wn.2d 700, 705, 611 P.2d 1256 (1980). The Ninth Circuit Court of Appeals has threatened this system through a decision, that, if not overturned by the United States Supreme Court, may require change. In the event of a final court judgment invalidating the blanket primary, this People's Choice Initiative will become effective to implement a system that best protects the rights of voters to make such choices, increases voter participation, and advances compelling interests of the state of Washington." [2005 c 2 § 2 (Initiative Measure No. 872, approved November 2, 2004).]

Contingent effective date – 2005 c 2 (Initiative Measure No. 872): "This act

RCW 29A.52.112: Top two candidates.

takes effect only if the Ninth Circuit Court of Appeals' decision in *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (9th Cir. 2003) holding the blanket primary election system in Washington state invalid becomes final and a Final Judgment is entered to that effect." [2005 c 2 § 18 (Initiative Measure No. 872, approved November 2, 2004).]

Reviser's note: On February 28, 2004, the United States Supreme Court refused to take the case on appeal; therefore the Ninth Circuit's decision stands.

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WACs > Title 434 > Chapter 434-230 > Section 434-230-015

434-230-010 << 434-230-015 >> 434-230-025

Agency filings affecting this section

WAC 434-230-015
Ballot format.

(1) Each ballot shall specify the county, the date, and whether the election is a primary, special or general.

(2) Each ballot must include instructions directing the voter how to mark the ballot, including write-in votes.

(3) Each ballot must explain, either in the general instructions or in the heading of each race, the number of candidates for whom the voter may vote (e.g., "vote for one").

(4)(a) If the ballot includes a partisan office, the ballot must include the following notice in bold print immediately above the first partisan congressional, state or county office: "READ: Each candidate for partisan office may state a political party that he or she prefers. A candidate's preference does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate."

(b) When the race for president and vice-president appears on a general election ballot, instead of the notice required by (a) of this subsection, the ballot must include the following notice in bold print after president and vice-president but immediately above the first partisan congressional, state or county office: "READ: Each candidate for president and vice-president is the official nominee of a political party. For other partisan offices, each candidate may state a political party that he or she prefers. A candidate's preference does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate."

(c) The same notice may also be listed in the ballot instructions.

(5) Counties may use varying sizes and colors of ballot cards if such size and color is used consistently throughout a region, area or jurisdiction (e.g., legislative district, commissioner district, school district, etc.). Varying color and size may also be used to designate absentee ballots, poll ballots, or provisional ballots.

(6) Ballots shall be formatted as provided in RCW 29A.36.170. Ballots shall not be formatted as stated in RCW 29A.04.008 (6) and (7), 29A.36.104, 29A.36.106, 29A.36.121,29A.36.161 (4), and 29A.36.191.

(7) Removable stubs are not considered part of the ballot.

[Statutory Authority: RCW 29A.04.611. 09-18-098, § 434-230-015, filed 9/1/09, effective 10/2/09; 08-15-052, § 434-230-015, filed 7/11/08, effective 8/11/08.]

WSR 08-12-013

EMERGENCY RULES

SECRETARY OF STATE

(Elections Division)

[Filed May 27, 2008, 1:03 p.m. , effective May 27, 2008, 1:03 p.m.]

Effective Date of Rule: Immediately.

Purpose: The purpose of these rules is to implement Initiative 872 for partisan public offices, and to administer political party precinct committee officer elections, for the 2008 primary and general elections.

Statutory Authority for Adoption: RCW 29A.04.611.

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: On March 18, 2008, the United States Supreme Court issued *Washington State Grange v. Washington State Republican Party, et al.* 552 U.S. __, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008). In this opinion, the court reversed a Ninth Circuit opinion that had declared Washington's top two primary system unconstitutional. The impact of this ruling is that the primary system enacted by Initiative 872 (chapter 2, Laws of 2005) is now in effect. This change in primary election systems necessitates changes in the administrative rules relating to the format of ballots, and administration of political party precinct committee officer elections. The regular candidate filing period ends June 6, 2008. Ballots will be formatted and sent to print in June. There is insufficient time to adopt these rules through the standard rule-making process.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 3, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: May 27, 2008.

Steve Excell

Assistant Secretary of State

OTS-1649.1

NEW SECTION

WAC 434-230-036 Office format for partisan offices. The description "partisan office" must be printed either for each partisan office or as a heading above a group of partisan offices.

[]

OTS-1650.1

NEW SECTION

WAC 434-230-100 Political party precinct committee officer. (1) In even-numbered years, the election for the position of political party precinct committee officer must be held on the third Tuesday of August.

(2) Unlike candidates for public partisan office, candidates for precinct committee officer file and appear on the ballot as members of a major political party. The election of precinct committee officer is an intraparty election. Candidates compete against other candidates from the same political party. The candidate of each political party who receives the most votes is declared elected. Precinct committee officers are not elected according to the top two primary system established by chapter 2, Laws of 2005 (Initiative 872).

(3) Unlike candidates for public office, the order in which candidates for precinct committee officer appear on the ballot is based on each candidate's political party. The political party that received the highest number of votes from the electors of this state for the office of president at the last presidential election must appear first, with the other political parties following according to the number of votes cast for their nominees for president at the last presidential election. Within each party, candidates shall be listed in the order determined by lot.

(4) If no candidate files for political party precinct committee officer, the position appears on the ballot with a write-in line. There is no special filing period, the political party does not appoint a candidate, and the election does not lapse. If no candidate is elected, the party may fill the position by appointment, pursuant to RCW 29A.28.071.

(5)(a) The position of political party precinct committee officer must appear following all measures and public offices.

(b) The heading must state, "election of political party precinct committee officer."

(c) The following explanation must be provided before the list of candidates: "Precinct committee officer is a position in each major political party. For this office only: If you consider yourself a democrat or republican, you may vote for a candidate of that party."

(d)(i) If all candidates are listed under one heading, the applicable major political party affiliation of either "democratic party candidate" or "republican party candidate" must be printed under each candidate's name. The first letter of each word must be capitalized, as shown in the following example:

John Smith

Democratic Party Candidate

The race must explain, "for a write-in candidate, include party."

(ii) If candidates are listed under a major political party heading, the applicable heading of either "democratic party candidates" or "republican party candidates" must be printed above each group of candidates. The first letter of each word must be capitalized. A write-in line must be provided for each political party heading.

(6) A voter may vote for only one candidate for precinct committee officer. If a voter votes for more than one candidate, the votes must be treated as overvotes. For the limited purpose of voting in a precinct committee officer election, a voter affiliates with a major political party when he or she votes for a candidate of that party.

[]

OTS-1651.1

NEW SECTION

WAC 434-262-075 Election of political party precinct committee officers. (1) The election of political party precinct committee officers is not conducted according to a top two primary established by chapter 2, Laws of 2005 (Initiative 872). The candidate of each political party who receives the most votes in the August primary election is declared elected.

(2) RCW 29A.80.051 includes a requirement that, to be declared elected, a candidate for precinct committee officer must receive at least ten percent of the number of votes cast for a candidate of the same party who received the most votes in the precinct. This requirement for election is not in effect because candidates for public office do not represent a political party.

[]

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RCWs > Title 42 > Chapter 42.17 > Section 42.17.040

42.17.035 << 42.17.040 >> 42.17.050

RCW 42.17.040
Statement of organization by political committees. (Effective until January 1, 2012.)

(1) Every political committee, within two weeks after its organization or, within two weeks after the date when it first has the expectation of receiving contributions or making expenditures in any election campaign, whichever is earlier, shall file a statement of organization with the commission. A political committee organized within the last three weeks before an election and having the expectation of receiving contributions or making expenditures during and for that election campaign shall file a statement of organization within three business days after its organization or when it first has the expectation of receiving contributions or making expenditures in the election campaign.

(2) The statement of organization shall include but not be limited to:

(a) The name and address of the committee;

(b) The names and addresses of all related or affiliated committees or other persons, and the nature of the relationship or affiliation;

(c) The names, addresses, and titles of its officers; or if it has no officers, the names, addresses, and titles of its responsible leaders;

(d) The name and address of its treasurer and depository;

(e) A statement whether the committee is a continuing one;

(f) The name, office sought, and party affiliation of each candidate whom the committee is supporting or opposing, and, if the committee is supporting the entire ticket of any party, the name of the party;

(g) The ballot proposition concerned, if any, and whether the committee is in favor of or opposed to such proposition;

(h) What distribution of surplus funds will be made, in accordance with RCW 42.17.095, in the event of dissolution;

(i) The street address of the place and the hours during which the committee will make available for public inspection its books of account and all reports filed in accordance with RCW 42.17.080;

(j) Such other information as the commission may by regulation prescribe, in keeping with the policies and purposes of this chapter;

(k) The name, address, and title of any person who authorizes expenditures or makes decisions on behalf of the candidate or committee; and

(l) The name, address, and title of any person who is paid by or is a volunteer for a candidate or political committee to perform ministerial functions and who performs ministerial functions on behalf of two or more candidates or committees.

(3) Any material change in information previously submitted in a statement of organization shall be reported to the commission within the ten days following the change.

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RCWs Title 42 Chapter 42.17 Section 42.17.510

42.17.471 << 42.17.510 >> 42.17.520

RCW 42.17.510
Identification of sponsor — Exemptions. (*Effective until January 1, 2012.*)

(1) All written political advertising, whether relating to candidates or ballot propositions, shall include the sponsor's name and address. All radio and television political advertising, whether relating to candidates or ballot propositions, shall include the sponsor's name. The use of an assumed name for the sponsor of electioneering communications, independent expenditures, or political advertising shall be unlawful. For partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, that party or independent designation shall be clearly identified in electioneering communications, independent expenditures, or political advertising.

(2) In addition to the information required by subsection (1) of this section, except as specifically addressed in subsections (4) and (5) of this section, all political advertising undertaken as an independent expenditure or an electioneering communication by a person or entity other than a bona fide political party must include as part of the communication:

(a) The statement: "No candidate authorized this ad. It is paid for by (name, address, city, state)";

(b) If the sponsor is a political committee, the statement: "Top Five Contributors," followed by a listing of the names of the five persons or entities making the largest contributions in excess of seven hundred dollars reportable under this chapter during the twelve-month period before the date of the advertisement or communication; and

(c) If the sponsor is a political committee established, maintained, or controlled directly, or indirectly through the formation of one or more political committees, by an individual, corporation, union, association, or other entity, the full name of that individual or entity.

(3) The information required by subsections (1) and (2) of this section shall:

(a) Appear on the first page or fold of the written advertisement or communication in at least ten-point type, or in type at least ten percent of the largest size type used in a written advertisement or communication directed at more than one voter, such as a billboard or poster, whichever is larger;

(b) Not be subject to the half-tone or screening process; and

(c) Be set apart from any other printed matter.

(4) In an independent expenditure or electioneering communication transmitted via television or other medium that includes a visual image, the following statement must either be clearly spoken, or appear in print and be visible for at least four seconds, appear in letters greater than four percent of the visual screen height, and have a reasonable color contrast with the background: "No candidate authorized this ad. Paid for by (name, city, state)." If the advertisement or communication is undertaken by a nonindividual other than a party organization, then the following notation must also be included: "Top Five Contributors" followed by a listing of the names of the five persons or entities making the largest

contributions in excess of seven hundred dollars reportable under this chapter during the twelve-month period before the date of the advertisement. Abbreviations may be used to describe contributing entities if the full name of the entity has been clearly spoken previously during the broadcast advertisement.

(5) The following statement shall be clearly spoken in an independent expenditure or electioneering communication transmitted by a method that does not include a visual image: "No candidate authorized this ad. Paid for by (name, city, state)." If the independent expenditure or electioneering communication is undertaken by a nonindividual other than a party organization, then the following statement must also be included: "Top Five Contributors" followed by a listing of the names of the five persons or entities making the largest contributions in excess of seven hundred dollars reportable under this chapter during the twelve-month period before the date of the advertisement. Abbreviations may be used to describe contributing entities if the full name of the entity has been clearly spoken previously during the broadcast advertisement.

(6) Political yard signs are exempt from the requirement of subsections (1) and (2) of this section that the name and address of the sponsor of political advertising be listed on the advertising. In addition, the public disclosure commission shall, by rule, exempt from the identification requirements of subsections (1) and (2) of this section forms of political advertising such as campaign buttons, balloons, pens, pencils, sky-writing, inscriptions, and other forms of advertising where identification is impractical.

(7) For the purposes of this section, "yard sign" means any outdoor sign with dimensions no greater than eight feet by four feet.

[2010 c 204 § 505; 2005 c 445 § 9; 1995 c 397 § 19; 1993 c 2 § 22 (Initiative Measure No. 134, approved November 3, 1992); 1984 c 216 § 1.]

Notes:

Advertising rates for political candidates: RCW 65.16.095.

PUBLIC DISCLOSURE COMMISSION

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To: Members, Washington State Public Disclosure Commission
From: Lori Anderson, Communications & Training Officer
Date: May 18, 2010
Re: Public Hearing and Possible Emergency Adoption of New Rules, WAC 390-05-274 and WAC 390-05-196, and Rule Amendments to WAC 390-05-275 and WAC 390-17-060

During the March 2010 meeting, staff identified four rules that would be presented to the Commission for possible adoption prior to June 30, 2010.

Top Two Primary – (Three Rules)

As was discussed at last month's meeting, the passage of I-872 and the subsequent U. S. Supreme Court decision upholding the Top Two primary system inadvertently impacted the implementation of RCW 42.17 by impliedly repealing the section of law relating to Minor Party and Independent Candidate Nominations. Nancy Krier's April 14, 2010 memo explaining I-872's impact on the implementation of RCW 42.17 is attached. That memo also pointed out that any rule relating to campaign finance, political advertising or related forms must be in effect by June 30 of a given year or it cannot go into effect until the day following the general election. RCW 42.17.370(1).

The following draft proposals are presented to the Commission for consideration and possible adoption:

> **New WAC 390-05-274, Party affiliation, party preference, etc.,** will clarify the term "party affiliation" and references to "party," "political party," and similar terms on disclosure forms and elsewhere in Title 390 WAC;
>
> **New WAC 390-05-196, Bona fide political party – Application of term**, will allow the Commission to continue to recognize as a bona fide political party an organization that filed a valid certificate of nomination with the Secretary of State in any year between 2002 and 2007; and
>
> **Amend WAC 390-05-275, Definition – Party organization**, to include a reference to new WAC 390-05-196.

Action by the Commission: Staff is requesting the Commission adopt, on an emergency basis to be effective June 30, 2010, new proposed rules WAC 390-05-274 and WAC 390-05-196 and the proposed amendment to WAC 390-05-275. If you proceed, these emergency rules will be in effect for 120 days.

As noted in the attached memo, Chapter 204, Laws of 2010 confirms the Secretary of State's authority to recognize an organization as a minor political party beginning in January 2012. Upon the expiration of any emergency rules and until 2012, the Commission would once again be faced with the discordance of I-872 and RCW 42.17. Should the Commission adopt the draft proposals on an emergency basis, staff will ask the Commission at its next meeting to begin permanent rulemaking for these proposals.

Bona fide political party committees' exempt activities – (One Rule)

RCW 42.17.640(15) sets out certain activities that are exempt from contribution limits. Chapter 204 §602, Laws of 2010 **added** "an expenditure or contribution for **independent expenditures** as defined in RCW 42.17.020 or **electioneering communications** as defined in RCW 42.17.020." That change became effective March 25, 2010.

An "electioneering communication" is defined as a communication clearly identifying at least one candidate for state, local, or judicial office, appearing within 60 days of an election in the candidate's jurisdiction through radio, TV, postal mailing, billboard, newspaper, or periodical and either alone, or in combination with other communications by the sponsor identifying the candidate, having a fair market value of $5,000 or more. WAC 390-05-210 establishes that an electioneering communication is a contribution if it is done in cooperation, consultation, concert or collaboration with, or at the request or suggestion of a candidate or the candidate's authorized committee or agent.

The draft rule amendment proposed for emergency adoption amends **WAC 390-17-060, Exempt activities – Definitions, reporting,** to confirm that an electioneering communication made in cooperation, consultation, concert or collaboration with, or at the request or suggestion of a candidate or the candidate's authorized committee or agent does not qualify as an exempt activity, even after the 2010 amendment to the law.

Action by the Commission: Staff is requesting the Commission adopt, on an emergency basis to be effective June 30, 2010, the proposed amendment to WAC 390-17-060. If adopted on an emergency basis, staff will ask the Commission at its next meeting to begin the permanent rulemaking for this proposal as well.

Attachments: Draft Rules: New WACs 390-05-274 and 390-05-196 and Amended WAC 390-05-275
Nancy Krier's April 14, 2010 Memo Re: I-872's Impact on RCW 42.17

State of Washington
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TO: Members, Public Disclosure Commission
FROM: Nancy Krier, General Counsel
DATE: April 14, 2010
SUBJECT: Background - Initiative 872 (Top Two Primary) and its Impact on Implementation of Campaign Finance Law Provisions in 2010 and 2011

Summary

Chapter 42.17 currently provides that a bona fide political party is different from a political committee with respect to contribution limits. RCW 42.17.020(6) defines bona fide political parties as including those filing a valid certificate of nomination with the Secretary of State under RCW 29A.20. However, that chapter was impliedly repealed by Initiative 872, which established the Top Two Primary. Thus, the certificate of nomination process no longer exists. In 2008 and 2009, the Commission addressed the inadvertent impact of Initiative 872 on RCW 42.17 by adopting three emergency rules, pending further action by the Legislature.

The Legislature did not act in 2008 or 2009 to address the Top 2 issues for RCW 42.17, but in 2010 it did fix the law regarding the bona fide political party definition. Beginning January 1, 2012, the Secretary of State will again have the authority to recognize an organization as a minor political party. Chapter 204, § 101, Laws of 2010 (2SHB 2016). This leaves the remainder of 2010, and 2011, to be addressed. Emergency rules will again be suggested.

In 2010 the Legislature did not address the term party "affiliation" as it is used in RCW 42.17 and Title 390 WAC. You may recall the term now used is a candidate's party "preference" as expressed on his or her declaration of candidacy, not affiliation. In the past, the Commission also addressed this situation in an emergency rule. An emergency rule will again be suggested. It may also be time to again consider cleaning up this affiliation reference and one other term regarding references to the fact that primaries no longer "nominate" candidates, in 2011 legislation.

Meanwhile, the questions before you are:

(1) Whether you want to continue to recognize as bona fide political parties those organizations that had been granted minor party status prior to the repeal of Chapter 29A.20 RCW, as you did in 2008 and 2009, and until the new law goes into effect on January 1, 2012;
(2) Whether you wish to continue to explain that a party "affiliation" by a candidate as the term is used in RCW 42.17 and Title 390 WAC means a party "preference";
(3) Whether you want to proceed with both emergency as well as permanent rulemaking; and;
(4) Whether you want to consider input on a clean-up bill for the 2011 session.

In her rulemaking presentation at your March meeting, Lori Anderson briefly noted that three emergency rules will be presented to you on this topic and there would be a recommendation for some permanent rulemaking. The Commission concurred with proceeding with rulemaking. This memorandum provides additional background and details. The proposed draft emergency rules will be presented at your May meeting.

Background

- **2008**

In March of 2008, the U.S. Supreme Court upheld Washington's Top Two Primary system which was enacted into law by the voters in 2004 through the passage of I-872. 2008 was the first year the Top Two system was implemented by elections officials. Further, since the Supreme Court's decision was not issued until March of 2008, the Legislature had not had an opportunity to respond to the Top Two decision to address any impacted laws, including the portion of the district court decision concluding that I-872 impliedly repealed chapter 29A.20 RCW relating to minor party and independent candidate nominations.

The definition of "bona fide political party" in the campaign finance statute relies on the process in RCW 29A.20 to distinguish bona fide political parties from other political committees for contribution limit purposes. RCW 42.17.020(6). Since RCW 29A.20 was repealed, there is no process for organizations to engage in so that they quality as minor parties as opposed to regular political committees.

In addition, primaries in Washington are now runoff elections, not "nominating" elections. For partisan office, a candidate's party designation on the declaration of candidacy form indicates the candidate's preference only, and does not indicate a formal affiliation between the candidate and the party specified, or reflect an endorsement or support of that party. However, RCW 42.17 and Title 390 WAC use the terms "nomination" and party "affiliation." See, e.g., RCW 42.17.020(39), RCW 42.17.040(2)(f).

In June of 2008, the Commission adopted three emergency rules to address campaign finance issues implicated by I-872, pending legislative consideration and action to harmonize the provisions of Title 29A with the Top Two Primary decision in 2009. Those rules addressed party affiliation and bona fide political parties. Those rules expired in late October 2008.

- **2009**

The Secretary of State introduced legislation in 2009, SB 5681, to update election laws consistent with the Top Two Primary system. That bill passed out of policy committee, but did not advance to the Senate floor for consideration. Consequently, the Commission, in May 2009, again adopted the three emergency rules previously adopted in 2008, and pending further action by the Legislature.

Also in May the Commission determined it may pursue legislative action in 2010 to make technical corrections to RCW 42.17.020. Staff contacted the Secretary of State's Office and it was anticipated a bill would be requested by the Secretary of State in 2010 to address several Top 2 primary issues. However, as reported to the Commission in December 2009, the Secretary of State's Office determined it would not be moving forward with such agency request legislation.

- **2010**

Meanwhile, in 2009, a bill concerning the Commission's laws, HB 2016, had been introduced. It did not pass in 2009 but it did pass in 2010. The Legislature enacted 2SHB 2016 (Chapter 204, Laws of 2010). In amendments to RCW 42.17.020, it addressed the bona fide political party definition in Section 101. That section amends RCW 42.17.020(6) to define "bona fide political party" to include

"an organization that has been recognized as a minor political party by the secretary of state." See enclosed. This section is effective January 1, 2012. No action was taken to address the other Top 2 clean-up matters.

Options

Bona Fide Political Parties

The contribution limit provisions approved by voters in 1992 rely on RCW 29A.20 to distinguish bona fide political parties from other political committees. Bona fide parties may contribute considerably more to their candidates than may committees that do not satisfy the definition: For example, a state party committee can contribute $50,073 to a candidate for State Representative from the 27th Legislative District. A political committee can contribute $800 per election to the same candidate.

Since there is no current mechanism for certifying/recognizing a minor party by the Secretary of State and there will not be until January 2012, the Commission could determine either:

(a) Minor parties currently do not technically exist for purposes of party contribution limits; or

(b) As the Commission decided in 2008 and 2009, I-872's impact on the bona fide political party definition in RCW 42.17 appears to be an unintended consequence and, consistent with the intent of I-134 and the intrinsic value of minor parties to the political process, clarify the definition of "bona fide political party" in rule to include those minor parties which in any year between 2002 and 2007 filed at least one valid certificate of nomination under former RCW 29A.20. This list includes: the American Heritage Party, Constitution Party, Green Party, Libertarian Party, Progressive Party, Socialist Equality Party, Socialist Workers Party, and Workers World Party. An emergency rule would apply for until October 27, 2010, and if permanent rules or other emergency rules are adopted, could extend in 2011. The proposal would be that such a rule would no longer be needed as of January 1, 2012.

- **Recommendation:**

Staff recommends the Commission select option (b). This will provide continuity between the past and the future. If (b) is selected, staff will schedule emergency rulemaking for the May meeting.

Party Preference

As it has done in the past, and in the absence of other legislative action at this time, the Commission could also adopt an emergency rule that describes that party "affiliation" means "preference" in RCW 42.17 and Title 390 WAC. This rule could be in effect until October 27, 2010. Pending no different legislative action, permanent rulemaking could also proceed to have a rule in place for 2011 and later.

- **Recommendation:**

Staff recommends this option.

Other Issues

The Commission may want to again consider clean-up legislation for 2011 to address the Top 2 issues remaining in RCW 42.17 such as the "affiliation" reference or outdated references to a primary "nomination" process.

- **Recommendation:**

Staff recommends you continue to explore giving input on a surgical clean-up bill to address the inadvertent impact of I-872 on RCW 42.17.

Emergency Rules

According to RCW 42.17.370(1), any rule relating to campaign finance, political advertising or related forms must be in effect by June 30 of a given year or it cannot go into effect until the day following the general election. The emergency rules if adopted in May would be in effect for 120 days from the date filed or a date specified in the adoption order (such as June 30).

RCW 34.05.350(1) provides an emergency rule may be adopted when an agency for good cause finds:

> (a) That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest;
> (b) That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule; or
> (c) In order to implement the requirements or reductions in appropriations enacted in any budget for fiscal years 2009, 2010, or 2011, which necessitates the need for the immediate adoption, amendment, or repeal of a rule, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the fiscal needs or requirements of the agency[.],

RCW 34.05.350(2) provides in pertinent part:

> An emergency rule adopted under this section takes effect upon filing with the code reviser, unless a later date is specified in the order of adoption, and may not remain in effect for longer than one hundred twenty days after filing. Identical or substantially similar emergency rules may not be adopted in sequence unless conditions have changed or the agency has filed notice of its intent to adopt the rule as a permanent rule, and is actively undertaking the appropriate procedures to adopt the rule as a permanent rule.

You adopted identical emergency rules in 2008 and 2009 because legislation had been introduced in 2009, which was a change in circumstances after the emergency rule was adopted 2008. Because a legislative fix was partially obtained in 2010, it is possible to adopt an identical emergency rule once again. At this time, should you select to move forward, staff will ask you to simultaneously proceed with permanent rulemaking. If the Legislature acts in 2011 or later to provide different guidance to the Commission, the rules can be amended or repealed. A permanent rule regarding "bona fide political party" could expire or be repealed effective January 1, 2012.

Enclosure

(4) "Ballot proposition" means any "measure" as defined by RCW 29A.04.091, or any initiative, recall, or referendum proposition proposed to be submitted to the voters of the state or any municipal corporation, political subdivision, or other voting constituency from and after the time when the proposition has been initially filed with the appropriate election officer of that constituency ((~~prior to~~)) before its circulation for signatures.

(5) "Benefit" means a commercial, proprietary, financial, economic, or monetary advantage, or the avoidance of a commercial, proprietary, financial, economic, or monetary disadvantage.

(6) "Bona fide political party" means:

(a) An organization that has ((~~filed a valid certificate of nomination with~~)) been recognized as a minor political party by the secretary of state ((~~under chapter 29A.20 RCW~~)));

(b) The governing body of the state organization of a major political party, as defined in RCW 29A.04.086, that is the body authorized by the charter or bylaws of the party to exercise authority on behalf of the state party; or

(c) The county central committee or legislative district committee of a major political party. There may be only one legislative district committee for each party in each legislative district.

(7) "Depository" means a bank ((~~designated by a candidate or political committee pursuant to RCW 42.17.050~~)), mutual savings bank, savings and loan association, or credit union doing business in this state.

(8) "Treasurer" and "deputy treasurer" mean the individuals appointed by a candidate or political committee, pursuant to RCW 42.17.050 (as recodified by this act), to perform the duties specified in that section.

(9) "Candidate" means any individual who seeks nomination for election or election to public office. An individual seeks nomination or election when he or she first:

(a) Receives contributions or makes expenditures or reserves space or facilities with intent to promote his or her candidacy for office;

(b) Announces publicly or files for office;

(c) Purchases commercial advertising space or broadcast time to promote his or her candidacy; or

NEW SECTION

WAC 390-05-274 Party affiliation, party preference, etc. (1) "Party affiliation" as that term is used in chapter 42.17 RCW and Title 390 WAC means the candidate's party preference as expressed on his or her declaration of candidacy. A candidate's preference does not imply that the candidate is nominated or endorsed by that party, or that the party approves of or associates with that candidate.

(2) A reference to "political party affiliation," "political party," or "party" on disclosure forms adopted by the commission and in Title 390 WAC refers to the candidate's self-identified party preference.

NEW SECTION

WAC 390-05-196 Bona fide political party--Application of term. An organization that filed a valid certificate of nomination with the secretary of state or a county elections official under chapter 29A.20 RCW in any year from 2002 through 2007 is deemed to have satisfied the definition of bona fide political party in RCW 42.17.020.

AMENDATORY SECTION (Amending WSR 07-08-044, filed 3/28/07, effective 4/28/07)

WAC 390-05-275 Definition--Party organization. "Party organization," as that term is used in chapter 42.17 RCW and Title 390 WAC, means a bona fide political party as defined in RCW 42.17.020 and applied in WAC 390-05-196.

AMENDATORY SECTION (Amending WSR 07-07-005, filed 3/8/07, effective 4/8/07)

WAC 390-17-060 Exempt activities--Definitions, reporting. (1)(a) "Exempt contributions" are contributions made to a political committee which are earmarked for exempt activities as described in RCW 42.17.640. Such contributions are required to be reported under RCW 42.17.090, are subject to the restrictions in RCW 42.17.105(8), but are not subject to the contribution limits in RCW 42.17.640. Any written solicitation for exempt contributions must be so designated. Suggested designations are "not for individual candidates" or "for exempt activities."

(b) Contributions made to a caucus political committee, to a candidate or candidate's authorized committee which are earmarked for voter registration, absentee ballot information, get-out-the-vote campaigns, sample ballots are presumed to be for the purpose of promoting individual candidates and are subject to the contribution limits in RCW 42.17.640.

(c) Contributions made to a caucus political committee, to a candidate or candidate's authorized committee which are earmarked for internal organization expenditures or fund-raising are presumed to be with direct association with individual candidates and are subject to the contribution limits in RCW 42.17.640.

(2) "Exempt contributions account" is the separate bank account into which only exempt contributions are deposited and out of which only expenditures for exempt activities shall be made.

(3) "Exempt activities" are those activities referenced in RCW 42.17.640 as further clarified by subsections (4), (5), and (6)((~~, and (7)~~)) of this section. Only exempt activities are eligible for payment with exempt contributions.

(4)(a) ((~~Except as permitted by WAC 390-17-030, Sample ballots and slate cards, activities referenced in RCW 42.17.640 that promote or constitute political advertising for one or more clearly identified candidates do not qualify as exempt activities.~~

~~(b) A candidate is deemed to be clearly identified if the name of the candidate is used, a photograph or likeness of the candidate appears, or the identity of the candidate is apparent by unambiguous reference.~~

~~(5)~~)) Activities referenced in RCW 42.17.640 (15)(a) that do not promote, or constitute political advertising for, one or more clearly identified candidates qualify as exempt activities. For example, get-out-the-vote telephone bank activity that only encourages persons called to "vote republican" or "vote democratic" in the upcoming election may be paid for with exempt contributions regardless of the number of candidates who are benefited by this message. Expenditures or contributions for electioneering communications made in cooperation, consultation, concert or

collaboration with, or at the request or suggestion of a candidate, the candidate's authorized committee or agent do not qualify as exempt activities, under WAC 390-05-210.

(b) Except as permitted under WAC 390-17-030, Sample ballots and slate cards, activities referenced in RCW 42.17.640 (15)(a) that promote or constitute political advertising for one or more clearly identified candidates do not qualify as exempt activities.

(c) A candidate is deemed to be clearly identified if the name of the candidate is used, a photograph or likeness of the candidate appears, or the identity of the candidate is apparent by unambiguous reference.

((~~(6)~~)) (5)(a) "Internal organization expenditures" referenced in RCW 42.17.640 (15)(b) are expenditures for organization purposes, including legal and accounting services, rental and purchase of equipment and office space, utilities and telephones, postage and printing of newsletters for the organization's members or contributors or staff when engaged in organizational activities such as those previously listed, all without direct association with individual candidates.

(b) "Fund-raising expenditures" referenced in RCW 42.17.640 (15)(b) are expenditures for fund-raising purposes, including facilities for fund-raisers, consumables furnished at the event and the cost of holding social events and party conventions, all without direct association with individual candidates.

(c) If expenditures made pursuant to subsections (a) and (b) above are made in direct association with individual candidates, they shall not be paid with exempt contributions.

((~~(7)~~)) (6) For purposes of RCW 42.17.640 and this section, activities that oppose one or more clearly identified candidates are presumed to promote the opponent(s) of the candidate(s) opposed.

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WACs > Title 434 > Chapter 434-230 > Section 434-230-100

434-230-095 << 434-230-100 >> 434-230-110

WAC 434-230-100

Agency filings affecting this section

Political party precinct committee officer.

(1) In even-numbered years, the election for the position of political party precinct committee officer must be held on the third Tuesday of August.

(2) Unlike candidates for public partisan office, candidates for precinct committee officer file and appear on the ballot as members of a major political party. The election of precinct committee officer is an intraparty election. Candidates compete against other candidates from the same political party. The candidate of each political party who receives the most votes is declared elected. Precinct committee officers are not elected according to the top two primary system established by chapter 2, Laws of 2005 (Initiative 872).

(3) Unlike candidates for public office, the order in which candidates for precinct committee officer appear on the ballot is based on each candidate's political party. The political party that received the highest number of votes from the electors of this state for the office of president at the last presidential election must appear first, with the other political parties following according to the number of votes cast for their nominees for president at the last presidential election. Within each party, candidates shall be listed in the order determined by lot.

(4) If no candidate files for political party precinct committee officer, the position appears on the ballot with space for a write-in. There is no special filing period, the political party does not appoint a candidate, and the election does not lapse. If no candidate is elected, the party may fill the position by appointment, pursuant to RCW 29A.28.071.

(5)(a) The position of political party precinct committee officer must appear following all measures and public offices.

(b) The heading must state, "election of political party precinct committee officer."

(c) The following explanation must be provided before the list of candidates: "Precinct committee officer is a position in each major political party. For this office only: If you consider yourself a democrat or republican, you may vote for a candidate of that party."

(d)(i) If all candidates are listed under one heading, the applicable major political party affiliation of either "democratic party candidate" or "republican party candidate" must be printed under each candidate's name. The first letter of each word must be capitalized, as shown in the following example:

John Smith

Democratic Party Candidate

The race must explain, "for a write-in candidate, include party."

(ii) If candidates are listed under a major political party heading, the applicable heading of either "democratic party candidates" or "republican party candidates" must be printed above each group of candidates. The first letter of each word must be capitalized. Space for a write-in must be provided for each political party heading.

(6) A voter may vote for only one candidate for precinct committee officer. If a voter votes for

more than one candidate, the votes must be treated as overvotes. For the limited purpose of voting in a precinct committee officer election, a voter affiliates with a major political party when he or she votes for a candidate of that party.

[Statutory Authority: RCW 29A.04.611. 08-15-052, § 434-230-100, filed 7/11/08, effective 8/11/08.]

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RCWs > Title 29A > Chapter 29A.52 > Section 29A.52.151

29A.52.141 << 29A.52.151 >> 29A.52.161

RCW 29A.52.151
Ballot format — Procedures.

(1) Under a consolidated ballot format:

(a) A voter's affiliation with a major political party is inferred from either selecting only that party in the check-off box, or voting only for candidates of that political party in partisan races;

(b) A vote cast for a major political party candidate will only be tabulated and reported if cast by a voter who affiliated with that same major political party;

(c) A vote cast for a major political party candidate by a voter who affiliated with a different major political party may not be tabulated or reported;

(d) A vote cast for a major political party candidate by a voter who affiliated with more than one major political party may not be tabulated or reported; and

(e) A vote properly cast may not be affected by votes improperly cast for other races.

(2) Under a physically separate ballot format:

(a) Only one party ballot and one nonpartisan ballot may be voted;

(b) If more than one party ballot is voted, none of the ballots may be tabulated or reported;

(c) A voter's affiliation with a major political party is inferred from the act of voting the party ballot for that major political party; and

(d) Every eligible registered voter may vote a nonpartisan ballot.

[2007 c 38 § 4; 2004 c 271 § 142.]

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RCWs > Title 29A > Chapter 29A.80 > Section 29A.80.051

29A.80.041 << 29A.80.051 >> 29A.80.061

RCW 29A.80.051
Precinct committee officer — Election — Term.

The statutory requirements for filing as a candidate at the primaries apply to candidates for precinct committee officer. The office must be voted upon at the primaries, and the names of all candidates must appear under the proper party and office designations on the ballot for the primary for each even-numbered year, and the one receiving the highest number of votes will be declared elected. However, to be declared elected, a candidate must receive at least ten percent of the number of votes cast for the candidate of the candidate's party receiving the greatest number of votes in the precinct. The term of office of precinct committee officer is two years, commencing the first day of December following the primary.

[2004 c 271 § 149.]

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RCWs > Title 29A > Chapter 29A.80 > Section 29A.80.030

29A.80.020 << 29A.80.030 >> 29A.80.041

RCW 29A.80.030
County central committee — Organization meetings.

The county central committee of each major political party consists of the precinct committee officers of the party from the several voting precincts of the county. Following each state general election held in even-numbered years, this committee shall meet for the purpose of organization at an easily accessible location within the county, subsequent to the certification of precinct committee officers by the county auditor and no later than the second Saturday of the following January. The authorized officers of the retiring committee shall cause notice of the time and place of the meeting to be mailed to each precinct committee officer at least seventy-two hours before the date of the meeting.

At its organization meeting, the county central committee shall elect a chair and vice-chair of opposite sexes.

[2003 c 111 § 2003; 1987 c 295 § 12; 1973 c 85 § 1; 1973 c 4 § 5; 1965 c 9 § 29.42.030. Prior: 1961 c 130 § 4; prior: 1943 c 178 § 1, part; 1939 c 48 § 1, part; 1927 c 200 § 1, part; 1925 ex.s. c 158 § 1, part; 1909 c 82 § 6, part; 1907 c 209 § 22, part; Rem. Supp. 1943 § 5198, part. Formerly RCW 29.42.030.]

Notes:

Precinct election officers, appointment: RCW 29A.44.410 and 29A.44.430.

Washington Constitution, Art. II

SECTION 15 VACANCIES IN LEGISLATURE AND IN PARTISAN COUNTY ELECTIVE OFFICE. Such vacancies as may occur in either house of the legislature or in any partisan county elective office shall be filled by appointment by the county legislative authority of the county in which the vacancy occurs: *Provided,* That the person appointed to fill the vacancy must be from the same legislative district, county, or county commissioner or council district and the same political party as the legislator or partisan county elective officer whose office has been vacated, and shall be one of three persons who shall be nominated by the county central committee of that party, and in case a majority of the members of the county legislative authority do not agree upon the appointment within sixty days after the vacancy occurs, the governor shall within thirty days thereafter, and from the list of nominees provided for herein, appoint a person who shall be from the same legislative district, county, or county commissioner or council district and of the same political party as the legislator or partisan county elective officer whose office has been vacated, and the person so appointed shall hold office until his or her successor is elected at the next general election, and has qualified: *Provided,* That in case of a vacancy occurring after the general election in a year that the office appears on the ballot and before the start of the next term, the term of the successor who is of the same party as the incumbent may commence once he or she has qualified and shall continue through the term for which he or she was elected: *Provided,*That in case of a vacancy occurring in the office of joint senator, or joint representative, the vacancy shall be filled from a list of three nominees selected by the state central committee, by appointment by the joint action of the boards of county legislative authorities of the counties composing the joint senatorial or joint representative district, the person appointed to fill the vacancy must be from the same legislative district and of the same political party as the legislator whose office has been vacated, and in case a majority of the members of the county legislative authority do not agree upon the appointment within sixty days after the vacancy occurs, the governor shall within thirty days thereafter, and from the list of nominees provided for herein, appoint a person who shall be from the same legislative district and of the same political party as the legislator whose office has been vacated. [**AMENDMENT 96,** 2003 House Joint Resolution No. 4206, p 2819. Approved November 4, 2003.]

Governmental continuity during emergency periods: Art. 2 Section 42.

Vacancies in county, etc., offices, how filled: Art. 11 Section 6.

Amendment 52, part (1967) -- Art. 2 Section 15 VACANCIES IN LEGISLATURE AND IN PARTISAN COUNTY ELECTIVE OFFICE --*Such vacancies as may occur in either house of the legislature or in any partisan county elective office shall be filled by appointment by the board of county commissioners of the county in which the vacancy occurs: Provided, That the person appointed to fill the vacancy must be from the same legislative district, county or county commissioner district and the same political party as the legislator or partisan county elective officer whose office has been vacated, and shall be one of three persons who shall be nominated*

by the county central committee of that party, and in case a majority of said county commissioners do not agree upon the appointment within sixty days after the vacancy occurs, the governor shall within thirty days thereafter, and from the list of nominees provided for herein, appoint a person who shall be from the same legislative district, county or county commissioner district and of the same political party as the legislator or partisan county elective officer whose office has been vacated, and the person so appointed shall hold office until his successor is elected at the next general election, and shall have qualified: Provided, That in case of a vacancy occurring in the office of joint senator, or joint representative, the vacancy shall be filled from a list of three nominees selected by the state central committee, by appointment by the joint action of the boards of county commissioners of the counties composing the joint senatorial or joint representative district, the person appointed to fill the vacancy must be from the same legislative district and of the same political party as the legislator whose office has been vacated, and in case a majority of said county commissioners do not agree upon the appointment within sixty days after the vacancy occurs, the governor shall within thirty days thereafter, and from the list of nominees provided for herein, appoint a person who shall be from the same legislative district and of the same political party as the legislator whose office has been vacated. [AMENDMENT 52, part, 1967 Senate Joint Resolution No. 24, part; see 1969 p 2976. Approved November 5, 1968.]

Amendment 32 (1956) -- Art. 2 Section 15 VACANCIES IN LEGISLATURE AND IN PARTISAN COUNTY ELECTIVE OFFICE -- *Such vacancies as may occur in either house of the legislature or in any partisan county elective office shall be filled by appointment by the board of county commissioners of the county in which the vacancy occurs: Provided, That the person appointed to fill the vacancy must be from the same legislative district and the same political party as the legislator whose office has been vacated, and shall be one of three persons who shall be nominated by the county central committee of that party, and the person so appointed shall hold office until his successor is elected at the next general election, and shall have qualified:* Provided, *That in case of a vacancy occurring in the office of joint senator, or joint representative, the vacancy shall be filled from a list of three nominees selected by the state central committee, by appointment by the joint action of the boards of county commissioners of the counties composing the joint senatorial or joint representative district, the person appointed to fill the vacancy must be from the same legislative district and of the same political party as the legislator whose office has been vacated, and in case a majority of said county commissioners do not agree upon the appointment within sixty days after the vacancy occurs, the governor shall within thirty days thereafter, and from the list of nominees provided for herein, appoint a person who shall be from the same legislative district and of the same political party as the legislator whose office has been vacated.* [AMENDMENT 32, 1955 Senate Joint Resolution No. 14, p 1862. Approved November 6, 1956.]

Amendment 13 (1930) -- Art. 2 Section 15 VACANCIES IN LEGISLATURE -- *Such vacancies as may occur in either house of the legislature shall be filled by appointment by the board of county commissioners of the county in which the vacancy occurs, and the person so appointed shall hold office until his successor is elected at the next general election, and shall have qualified:* Provided, *That in case of a vacancy occurring in the office of joint senator, the vacancy shall be filled by appointment by the joint action of the boards of county commissioners of the counties composing the joint senatorial district.* [AMENDMENT 13, 1929 p 690. Approved November, 1930.]

Original text -- Art. 2 Section 15 WRITS OF ELECTION TO FILL VACANCIES -- *The governor shall issue writs of election to fill such vacancies as may occur in either house of the legislature.*

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WACs > Title 434 > Chapter 434-262 > Section 434-262-075

434-262-070 << 434-262-075 >> 434-262-080

WAC 434-262-075

Agency filings affecting this section

Election of political party precinct committee officers.

(1) Candidates for precinct committee officer file and appear on the ballot as members of a major political party. The election of political party precinct committee officers is not conducted according to a top two primary established by chapter 2, Laws of 2005 (Initiative 872). Candidates must make a public declaration of party affiliation in the form of a precinct committee officer declaration of candidacy. Write-in votes cast for an individual who has not filed a write-in declaration of candidacy shall not be counted. The candidate of each political party who receives the most votes in the August primary election is declared elected.

(2) RCW 29A.80.051 includes a requirement that, to be declared elected, a candidate for precinct committee officer must receive at least ten percent of the number of votes cast for a candidate of the same party who received the most votes in the precinct. This requirement for election is not in effect because candidates for public office do not represent a political party.

[Statutory Authority: RCW 29A.04.611, 29A.08.420, 29A.24.131, 29A.40.110, 29A.46.020, and 29A.80.041. 10-14-091, § 434-262-075, filed 7/6/10, effective 8/6/10. Statutory Authority: RCW 29A.04.611. 08-15-052, § 434-262-075, filed 7/11/08, effective 8/11/08.]

EXHIBIT 22

SESSION LAWS

OF THE

STATE OF WASHINGTON

REGULAR SESSION, THIRTY-SEVENTH LEGISLATURE
Convened January 9, 1961. Adjourned March 9, 1961.

EXTRAORDINARY SESSION, THIRTY-SEVENTH LEGISLATURE
Convened March 10, 1961. Adjourned March 31, 1961.

Compiled in Chapters by
VICTOR A. MEYERS
Secretary of State

VOLUME NO. 2

Containing Chapters 24 Through 308, Regular Session
Chapters 1 Through 27, Extraordinary Session

MARGINAL NOTES AND INDEX
By
RICHARD O. WHITE
Code Reviser

Published by Authority

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RCW 29.42.050 amended. Precinct committeeman—Election—Terms—Vacancies.

SEC. 6. (RCW 29.42.050) The statutory requirements for filing as a candidate at the primaries shall apply to candidates for precinct committeeman except that the filing period for this office alone shall be extended to and include the third Monday in August immediately preceding the state primaries, and the office shall not be voted upon at the primaries, but the names of all candidates must appear under the proper party and office designations on the ballot for the general November election and the one receiving the highest number of votes shall be declared elected: *Provided,* That to be declared elected, a candidate must receive at least ten percent of the number of votes cast for the candidate of his party receiving the greatest number of votes in his precinct. Any person elected to the office of precinct committeeman who has not filed a declaration of candidacy shall pay the fee of one dollar to the county auditor for a certificate of election. The term of office of precinct committeeman shall be for two years, commencing upon completion of the official canvass of votes by the county canvassing board of election returns. Should any vacancy occur in this office by reason of death, resignation or disqualification of the incumbent, or because of failure to elect, the respective county chairman of the county central committee shall be empowered to fill such vacancy by appointment: *Provided,* That the person so appointed shall have the same qualifications as candidates when filing for election to such office for such precinct: *Provided further,* That when a vacancy in the office of precinct committeeman exists because of failure to elect at a state general election, such vacancy shall not be filled until after the organization meeting of the county central committee and the new county chairman selected as provided by RCW 29.42.030.

SEC. 7. Section 3096, Code of 1881, section 24,

chapter 209, Laws of 1907 (heretofore divided, combined and codified as RCW 29.27.100, 29.30.100, 29.62.010, 29.62.100 and 29.62.110) are amended to read as set forth in sections 8, 9, 10, 11 and 12 of this act.

RCW 29.27.100 enacted without amendment.

SEC. 8. (RCW 29.27.100) Immediately after the ascertainment of the result of an election for an office to be filled by the voters of a single county, or of a precinct, or of a constituency within a county for which he serves as supervisor of elections, the county auditor shall notify the person elected, and upon his demand issue to him a certificate of his election.

RCW 29.30.100 enacted without amendment.

SEC. 9. (RCW 29.30.100) The names of the persons certified as the nominees resulting from a primary election by the state canvassing board or the county canvassing board shall be printed on the official ballot prepared for the ensuing election.

No name of any candidate whose nomination at a primary is required by law shall be placed upon the ballot unless it appears upon the certificate of either (1) the state canvassing board, or (2) the county canvassing board, or (3) a minor party convention, or (4) of the state or county central committee of a major political party to fill a vacancy on its ticket occasioned by any cause on account of which it is lawfully authorized so to do.

RCW 29.62.010 amended. Manner of canvassing election returns—Generally.

SEC. 10. (RCW 29.62.010) Every official body or officer upon whom is imposed the duty of canvassing the returns of any primary or election shall:

(1) Prepare and certify a statement separately setting forth for each office the returns as to which it or he is required by law to canvass, and the vote each candidate received therefor;

(2) If required to canvass returns from a primary, prepare and certify a statement separately setting forth each office the returns as to which it

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